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BY

T. T. ROLPH,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

J. F. SMITH. Q.C.,

EDITOR.

VOL. XII.

CONTAINING THE CASES DETERMINED,
WITH A TABLE OF THE NAMES OF CASES REPORTED,
A TABLE OF THE NAMES OF CASES CITED,
A TABLE OF THE SECTIONS AND RULES OF O. J. A. AND G. O. CHY. CITED
AND A DIGEST OF THE PRINCIPAL MATTERS.

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ERRATA.

Page 76, line 4 from top of page, for “plaintiff” read “defendant.”

Page 499, line 4 from bottom, for 3,373 read 3,273.

Page 612, third line of head-note, for 215 read 1215.

ONTARIO PRACTICE REPORTS.

SNOWDEN V. HUNTINGTON.

Appeal—Christmas vacation.

Christmas vacation is not to be excluded in reckoning the eight days within which an appeal from the Master or Local Judge or Master in Chambers is to be brought on under Rule 427, O. J. A. As such appeals are not heard in vacation, the time for appealing will be extended as a matter of course upon an *ex parte* application.

[January 17, 1887.—*Ferguson, J.*]

THIS was an appeal by the defendant from an order of the Master in Chambers, refusing to stay proceedings in this action. There were applications before the Master to stay this and a cross-action, and he decided to stay the defendant's action and to allow this one to proceed.

The Master's order was made on Monday the 20th December, 1886, and notice of appeal was served within four days thereafter, returnable on Monday the 10th of January, 1887, being the first day after Christmas Vacation on which a Judge sat in Chambers. On the 10th of January the appeal was enlarged till the 17th, subject to all objections. The first day of Christmas Vacation was Friday, the 24th of December, and the last day was Thursday, the 6th of January.

Upon the appeal coming on to be heard, *Hoyles*, for the plaintiff, objected that the appeal was not brought on within eight days, as required by Rule 427. Christmas Vacation is not excluded from the eight days for appealing from an order of the Master or local Judge in Chambers. *Blake v. The Building and Loan Association*, 10 P. R. 153, only decides that the time of Christmas Vacation is not to

be reckoned in the case of appeals from Masters' Reports under G. O. Chy. 642.

W. M. Douglas, for the defendant, contra.

FERGUSON, J., allowed the objection and dismissed the appeal with costs, holding that the time of Christmas Vacation is not excluded from the eight days within which an appeal is to be brought on, and that the appeal was therefore too late. There was of course a practical difficulty about bringing on the appeal in Christmas Vacation, as no Judge was sitting, but the time would have been extended as a matter of course, upon an *ex parte* application.

RE SMART INFANTS.

Habeas corpus—Evidence—R. S. O. ch. 70, sec. 1—Foreign commission—Discovery—Costs.

Held, that the provision in R. S. O. ch. 70, sec. 6, that the Court or Judge before whom any writ of *habeas corpus* is returnable, may proceed to examine into the truth of the facts set forth in such return by affidavit or by affirmation, is permissive only, and that a Judge has power in such a case to direct that the evidence shall be taken *vivâ voce* before him.

And in this matter it was directed as, in *Re Murdock*, 9 P. R. 132, that the evidence should be taken *vivâ voce*, and it was further ordered that a foreign commission should issue to take evidence abroad, and that the parties to the application should be at liberty to examine each other for discovery before the hearing.

The costs of the demurrer to the return (11 P. R. 482) were given against the father of the infant in any event of the proceeding.

[January 17, 1887.—*Ferguson, J.*]

THE proceedings in this matter by way of demurrer to the return to a writ of *habeas corpus* are reported 11 P. R. 482.

This was an application by the mother of the infants to have the evidence as to the truth of the facts stated in

the return taken *vivá voce* before the Judge who shall hear the motion for the custody of the infants.

S. H. Blake, Q. C., and *H. Cassels*, for the mother.

J. MacLennan, Q. C., and *H. J. Scott*, Q. C., for the father.

FERGUSON, J.—The parents are living apart. The infants, all under the age of twelve years, are in the custody of the mother. The father applied for and obtained a writ of *habeas corpus* which was duly served upon the mother. A return to this writ was made by her in which she set forth various matters as the causes or reasons why she had and claimed to have the custody and care of the children. The matters so set forth contained amongst other things charges against the father, agreements under seal executed by him, and statements respecting some litigation that had taken place between the parents. This return to the writ was objected to by the father as being insufficient in law. It was agreed between counsel that the question as to the sufficiency in law of the return, should be argued before me, and that after judgment or decision upon this question, counsel should be again heard, and that I should determine as to the manner of taking the evidence respecting the truth or not of the allegations contained in the return. I determined after argument that the return was and is good and sufficient in law. The other question as to the evidence has now been argued; counsel on behalf of the father contending that this evidence should be by affidavit or affirmation only, as mentioned in R. S. O. ch. 70, sec. 6, and that I have not power or jurisdiction to direct that it shall be otherwise taken. Counsel for the mother contend that what already appears indicates that evidence by affidavit or affirmation only would be, if that mode were the only mode, or the mode adopted, a very unsatisfactory way of dealing with the subject, and asked that the direction should be that the evidence should be *vivá voce* before me, or the Judge before whom the matter may

come; and further that, as some of the important facts took place in California, I should, in addition to such direction, (to save the expense of a separate application therefor) make an order for the issue of a commission to take the evidence respecting such facts or allegations. During the argument I expressed the opinion that the evidence should be taken *vivâ voce*, if there existed power to direct that it shall be so taken, and the question now is as to whether or not there is jurisdiction so to direct.

Much of the law upon the subject of the right, as the law then stood, to controvert the truth of the return to a *habeas corpus* or plead any matter repugnant to it appears in the answers of the Judges to the questions addressed by the House of Lords, which are found in the second edition of *Hurd* on Habeas Corpus, 258, 259, *et seq.*

Our statute above referred to, however, says: "In all cases provided for by this Act, although the return to any writ of *habeas corpus* is good and sufficient in law, the Court or any Judge before whom such writ is returnable, may proceed to examine into the truth of the facts set forth in such return by affidavit or by affirmation (in cases where an affirmation is allowed by law) *and do therein as to justice appertains.*" * * The contention of the counsel for the father was that the question must be considered and determined as a matter simply of the construction of this statute, and that so the evidence must be by affidavit or affirmation only. It is true that the statute does not mention any mode of taking the evidence but by affidavit or affirmation, but I cannot think that the effect is, that no other mode of taking the evidence can be adopted. The provision seems to me to be in this respect permissive.

In the case *In re Murdoch*, an infant, reported in 9 P. R. 132, which was a case in which the father had as here obtained a writ of *habeas corpus* for the delivery of his child to him, the evidence was *vivâ voce* evidence, which must have been directed by the learned

Judge before whom the matter was. The statement of the learned Judge (Gwynne, J.) near the conclusion of his judgment in the case *In re Leigh*, 5 P. R. at p. 418, has a bearing also, as shewing what was considered to be the general power of a Judge to require that the evidence should be taken by an examination of the witness *vivâ voce* for the purpose of arriving, if possible, at the actual truth of a matter. On the same or a like subject the case *Re Andrews*, L. R. 8 Q. B. 153, also casts some light.

If I decline to direct that the evidence shall be taken in the manner asked by counsel for the mother, that will be the equivalent of saying that I think the course adopted by the learned Judge in *Re Murdoch* was erroneous. I am not disposed to do this, and besides I think it was not erroneous, and that the Court has in such cases inherent power to make the direction asked.

The return is before the Court. It has been held to be good and sufficient in law. To this decision the father, the applicant, seems to have submitted, and it is he that seeks to controvert the facts therein stated. I am of the opinion that I have the power, when requested so to do by counsel for the mother, to direct that the evidence shall be *vivâ voce* evidence. I have no doubt from what has already appeared, that this will be much the better way of arriving, if possible, at the actual truth. I consider it necessary that the direction should be made, and I accordingly make it.

It was not disputed that if there should be the direction to take the evidence *vivâ voce*, there should be an order for the issue of a commission for the examination of the witnesses who are resident in California, and such order may go. I understand that both parties desired it in case the other direction were made. It was also agreed that if the direction aforesaid were given, counsel between themselves would settle the details of the matter as to the time of hearing, the commission, &c.

I was asked by counsel for the mother to dispose now of the costs of what was called the demurrer to the return

to the writ, which I had in a way reserved when giving judgment as to the sufficiency of the return. I am of the opinion that the husband should pay these costs, but I think it not desirable that there should be a taxation or collection of them at present. The payment of them will, therefore, be postponed till the determination of the matters of the application, or until further order in regard to them.

It was also agreed by counsel that in case I should direct that the evidence should be *vivâ voce*, the parties should submit to examination as in an ordinary action. Any order or direction that may issue will, if considered necessary, contain this as a term of it.

RE ALLISON ET AL., SOLICITORS.

Solicitor and client—Delivery of bill of costs—Offer by solicitor—Taxation.

Where a solicitor has offered to take in full settlement less than the amount of a bill of costs as rendered, and has made the offer in a manner unequivocal and binding upon him, then and not otherwise he is to be allowed the benefit of the offer upon taxation if the client reject it and proceed to tax the bill.

Re Freeman et al., 1 Ch. Chamb. R. 102, and *Re Carthew* and *Re Paull*, 27 Ch. D. 485, considered and explained.

And where the offer to make a reduction in the bill was not upon the face of it nor in any letter accompanying it, but was made verbally and in the course of a conversation on the subject after the delivery of the bill, *Held*, that the offer was not of an unequivocal character made so as to be binding upon the solicitor, but left him free when it was not accepted to claim all he could get upon a taxation, and he was therefore not entitled to the benefit of it.

[January 24, 1887.—*Ferguson, J.*]

THIS was an appeal by the solicitors from the report of the local Master at Picton, finding that the solicitors should pay the costs of an order and reference for the taxation of a bill of costs delivered by them, upon the ground that one-sixth had been taxed off their bill.

The amount of the bill as delivered was \$358.64. On the day after delivery of the bill the client called upon the solicitors, and in the course of a conversation with one of them, a verbal offer was made on behalf of the solicitors, to reduce the bill by \$87.70, making it \$270.94. This offer was not made or repeated in any other way than as stated, and was not accepted by the client, who afterwards took proceedings to have the bill taxed, and succeeded in taxing off \$125.97, thus reducing the amount due to the solicitors to \$232.67. If the bill was to be taken at \$358.64, the amount at which it was delivered, more than one-sixth had been taxed off, but if it was to be taken at \$270.94, the amount which the solicitors had offered to reduce it to, less than one-sixth had been taxed off. The Master took the former view, and accordingly awarded the client the costs of the order and reference, taxing them at \$91.10.

MacNee, for the appeal, referred to *Re Freeman et al.*, 1 Ch. Chamb. R. 102; *Re Solicitors*, 4 C. L. T. 199.

Watson, contra, cited *Re Carthew* and *Re Paull*, 27 Ch. D. 485; *Re Davy*, 5 P. R. 55; 1 *Chitty Arch.*, 12th ed., 124.

FERGUSON, J.—After conferring with some of the learned Judges whose experience in matters of this character is much greater than my own, I have arrived at the conclusion that the practice on this subject that has obtained in our Courts is, that where the solicitor has made the offer in a manner unequivocal and binding upon him in any event, he is allowed the benefit of the offer if the client reject it and proceed to the taxation of the bill; but not in a case where the solicitor makes the offer on the condition only that it is accepted by the client, leaving himself (the solicitor) in a position to claim from the client, in case of a rejection of the offer and taxation of the bill by the client, a sum greater than the sum that he would have received if the offer had been accepted, if the result of the taxation should so far be in his favour.

The case in 1 Ch. Chamb. R. 102 and 103 does not, I think, at all conflict with this practice, although it may be said that it does not state it fully. It does not appear by the report of the case how the offer was made. The learned Judge who decided the case said that he did not very well understand the contention respecting the bill of costs, which was only part of the matter in contention there.

The principle of the decision in the cases *Re Carthew* and *Re Paull*, 27 Ch. D. 485, does not appear to me to differ from the principle of our own practice as above stated, namely, that the solicitor who is bound by his offer should have the benefit of it upon the taxation of his bill. See remarks of L. J. Baggallay, p. 493. Those cases however appear to go further in adhering to the precise provisions (the words) of the Act, and seem to require that the bill should be a bill for the lesser sum, which requirement, I apprehend, would be fulfilled if the subtraction were plainly made at the foot of the bill, or made by a letter accompanying the bill, so that it would appear that the claim made was unequivocally a claim for the lesser sum only, and that the solicitor could in no event claim more.

In the present case the Master finds that the offer was made of a rebate of \$87.70 ; and he adds : " without offering to apply it to any specified items in the said bills." The Master does not say in what manner the offer was made. It does not appear in any form in the bills of costs, and there is no letter containing it produced. Then looking at the evidence, one sees that it was a verbal offer made in the course of a conversation on the subject, and was not of an unequivocal character, by which I mean that it was not made in such a manner as to be binding upon the solicitor in any event; but on the contrary of this, he might, notwithstanding the offer made, when not accepted, claim all he could get upon a taxation of the bills, if the result of the taxation should be in his favour in this respect ; so that neither according to the principle of our own practice (as above stated) on the

subject, nor according to what is laid down in the English cases above referred to, are the solicitors entitled to the benefit of the offer.

The question before me is single, and is as to whether or not the solicitors should have been given the benefit of this unaccepted offer in the calculation as to whether or not the one-sixth had been taxed off the bills, and I am, for the reasons that I have endeavoured to give, of the opinion that the conclusion of the Master was right, and that this appeal should be, as it is, dismissed, with costs.

MACDONALD V. MCCALL ET AL.

Costs—Creditor's action—Contribution—Appeal.

In a creditor's action to set aside a chattel mortgage as preferential, the judgment at the trial declared that the mortgage was fraudulent and void as against the plaintiff and such other creditors of the defendant C. as might contribute to the expenses of the suit; and directed that the plaintiff should be paid his party and party costs by the defendant McC., and his additional costs as between solicitor and client out of the fund recovered for the creditors by setting aside the mortgage. The case was carried by the defendants to the Court of Appeal and the Supreme Court of Canada, and the judgment at the trial was finally affirmed in all respects, but the additional costs as between solicitor and client were not given by the Court of Appeal or the Supreme Court.

Held, that the plaintiff's expenses in saving the fund were not limited to party and party costs, but extended to those incurred as between solicitor and client to the end of the proceedings in the Supreme Court; that the plaintiff had a right to object to the other creditors coming in to share in the fund until they had contributed to these extra costs; and, in order to avoid circuity, it was directed that they should be taxed and paid out of the fund.

[January 25, 1887.—*Boyd*, C.]

THIS was a creditor's action to set aside, as preferential, a chattel mortgage given by the defendant Cox to the defendant McCall. See 9 O. R. 185; 12 A. R. 593.

Ferguson, J., who tried the action, pronounced judgment in favour of the plaintiff, declaring "that the chattel mortgage in question is fraudulent and void as against

the plaintiff, and such other creditors of the defendant Cox as may contribute to the expenses of this suit." His judgment also directed that the party and party costs of the action should be paid to the plaintiff by the defendant McCall, and that the additional costs of the plaintiff, as between solicitor and client, should be paid out of the fund recovered by setting aside the chattel mortgage, the proceeds of the sale of the goods covered by it having been paid into Court.

The defendants carried the case to the Court of Appeal and the Supreme Court of Canada, and the judgment of Ferguson, J., was finally upheld in all respects, but the judgments of the higher Courts were silent as to the extra costs of the plaintiff incurred in those Courts.

Middleton, for the plaintiff, now moved for a direction to the taxing officer to tax to the plaintiff the costs incurred by him in the Court of Appeal and Supreme Court of Canada in addition to party and party costs.

George Kerr, for the defendant McCall, contra.

The authorities referred to are cited in the judgment.

BOYD, C.—The extra costs, being the difference between mere party and party costs and costs as between solicitor and client, have not been given by the Court of Appeal or the Supreme Court, but if the plaintiff is not recouped this outlay, it will absorb a considerable part of the dividend received on his debt, while the other creditors will reap the advantage of the plaintiff's success in intercepting the fund for the common benefit. This injustice is guarded against by [the declaration in the judgment which the Supreme Court has affirmed "that the chattel mortgage in question is fraudulent and void as against the plaintiff and such other creditors of the defendant Cox as may contribute to the expenses of this suit." The plaintiff's expenses in saving the fund are not limited to party and party costs, but extend to those incurred as between solicitor and client on the end of the proceedings in the appeal

to the Supreme Court. As said by the Vice-Chancellor in *Thompson v. Cooper*, 2 Coll. C.C. at p. 91, (1845;) "The principle is, that where in a creditor's suit the fund is insufficient to pay the plaintiff his costs, those who have come in and received a benefit under the decree must contribute to make good that loss which the plaintiff has borne on behalf of all creditors. The division of the costs must be in proportion to the amount proved and received." These expenses are, in such a case as this, to be measured by the proper expenditure for costs as between solicitor and client: *Barker v. Wardle*, 2 My. & K. 818.

The plaintiff has a right therefore to object to the other creditors coming in to share in the fund until they have contributed to these extra costs, but to avoid litigation it will be better to have these taxed now and paid out of the fund which will practically accomplish the same result: *Lechmere v. Brazier*, 1 Russ. 72; *Stanton v. Hatfield*, 1 Keen 358; *Sutton v. Doggett*, 3 Beav. 9; *Goldsmith v. Russell*, 5 DeG. M. & G. 547. The result of the cases and the reason of the rule on which I act is placed in a very clear light by Mr. Justice Kay, in a recent case: *Re McRea*, 32 Ch. D. 613.

Re Hill, 23 Ch. D. 266, is to some extent an authority, but I prefer not to rest my decision on that case. It is, I judge, not a decision susceptible of general application to the ordinary course of litigation, so as to govern the practice in the taxation of costs awarded in a particular action. It is really a decision on the scope of a statute which is not in force here: 3 & 4 Vic. ch. 127, sec. 25, by which the solicitor, who by his exertions recovers or preserves a fund, is entitled to a charge thereon for his costs. The point decided by Kay, J., and affirmed by the Lords Justices, was this, that the costs of an appeal, the effect of which, if successful, would be to destroy the fund recovered, were properly part of the costs to be charged thereon, even if that appeal was continued, and some of the costs therein were incurred, after the charging order.

MASSIE V. TORONTO PRINTING COMPANY.

Landlord and tenant—Attachment of debts—Rent—R. S. O. ch. 136, secs. 2-6—Mortgagor and Mortgagee.

R. S. O. ch. 136, secs. 2-6, does not contemplate any alteration of the law where the case remains strictly between landlord and tenant, but makes a severance where a third interest intervenes.

And where a judgment creditor garnished rents accruing due from several tenants to the judgment debtors before any of the gale days had arrived, *Held*, that he was entitled to payment over upon the gale days of the proportion of the rents which had accrued due on the day of service of the attaching order.

Quære, whether the rents could be garnished against a mortgagee of the landlord.

[December 23, 1886.—*The Master in Chambers.*]

[February 3, 1887.—*Galt, J.*]

THE plaintiff having a judgment against the defendants for the payment of money, obtained on the 18th December, 1886, an order attaching certain rents alleged to be due the defendants, and upon the same day served the order upon several tenants of the defendants. At the time of such service none of the rents were actually due, *i. e.*, the service was made between gale days in all cases.

F. J. Dunbar, for the plaintiff, now moved for payment over by the garnishees of such part of the rents as had accrued due on the day of service of the order.

Ingles, for the defendants, contra.

Echlin and Hands, for the garnishees.

The following authorities were referred to: R. S. O. ch. 136, secs. 2-6; *Patterson v. Richmond*, 17 C. L. J. 324; *Commercial Bank v. Jarvis*, 5 U. C. L. J. 66; *McLaren v. Sudworth*,⁴ U. C. L. J. 233; *Tapp v. Jones*, L. R. 10 Q. B. 591; *Lloyd v. Wallace*, 9 P. R. 335; *Sparks v. Younge*, 8 Ir. C. L. R. 251; *Woodfall on Landlord and Tenant*, 13th ed. 367; *Jones v. Thompson*, 27 L. J. Q. B. 234; *Jackson v. Cassidy*, 2 O. R. 521.

THE MASTER IN CHAMBERS.—I do not understand that R. S. O. ch. 136, in the clauses which respect the apportionment of rent in respect of time, contemplates any alteration of the law where the case remains strictly as between landlord and tenant, without the intervention of any third interest. Where it remains simply between the tenant and landlord, their contract is all-sufficient. Here on the 18th December inst., a third interest did intervene by the primary order in this garnishment; and what follows is that the judgment creditor is here entitled to garnish the rent in each of the several cases, for the current month or quarter up to the 18th December, when the severance created by the garnishing order took place.

The order upon the tenants must be to pay on the day that they had agreed to pay the landlord. In one of the cases, however, where the rent recoverable is only for three days, I will not make any order.

The contention that the creditor is entitled to garnish the rent for the whole of the unexpired month or quarter, is not sustainable at all. How is that a *debt*? Suppose there should be, before the rent becomes payable by the contract, an eviction by the landlord of the lessee from the whole or a part of the premises, then no rent would be payable by the tenant; and several other such cases may be put where by the common law there would be no right against the tenant for any rent.

There was much difficulty as to this garnishment law after the Judicature Act. I think it is pretty much settled by the decision of the Court of Appeal in 11 Q. B. D. 518, 711; and see the law as to apportionment of rent as to time; 13th ed. of *Woodfall*, 403 to 407, inclusive.

An appeal was taken to a Judge in Chambers, and argued by the same counsel.

GALT, J.—This is an appeal from an order made by the Master in Chambers. The application was for a garnishee order on certain tenants of the defendants to pay the rent

that had accrued. The learned Master made the order under the provisions of R. S. O. ch. 136. The only doubt I have on the subject arises from the fact that a mortgage exists. I am not prepared to say that as against a mortgagee an attaching creditor can garnish accruing rent, but as no objection is raised by the tenant in this case, the appeal will be dismissed with costs.

HOGG V. CRABBE.

Costs of the day.

Under an order made at the Assizes postponing the trial upon payment of "the costs of the day," only one counsel fee of \$10 is taxable.

[February 4, 1887.—*Proudfoot, J.*]

THIS was an appeal by the defendant from the taxation by the Master at London of the plaintiff's "costs of the day" under an order made at the Assizes postponing the trial upon payment of the "costs of the day" by the defendant.

Middleton, for the defendant, contended that under an order for the "costs of the day," the plaintiff could, according to the practice, tax only one counsel fee of \$10.

H. J. Scott, Q.C., for the plaintiff, contra.

PROUDFOOT, J.—I think I must allow this appeal.

The costs of putting off a trial at the instance of either party are in the discretion of the Judge, and if he had pleased he might have required payment of full counsel fees to the other side as a condition of the indulgence; but where, as in this case, he makes use of a technical phrase "the costs of the day" simply, which has by a long course of practice received a specific construction, that construction

must be observed. The meaning put upon this phrase includes only a single counsel fee of \$10, named a refresher, a term that would seem more appropriate if the case were adjourned for a day or so at the one Assizes, than to a case where the postponement is till another Assize. In the former case it would not interfere with the taxation of full counsel fees for the trial in the bill of costs. But even in the latter case it does not determine that no fee but the \$10 is to be taxed for the Assizes for which it was first set down. It is in the discretion of the taxing officer to determine what fees shall be taxed in such a case.

I have spoken to my brother Judges of this Division, and have referred to Mr. Clark the experienced taxing officer, and they agree in the foregoing.

The appeal is allowed, with costs.

RE CHRISTIE—CHRISTIE V. CHRISTIE ET AL.

Appeal—Forum—Divisions of High Court—Sec. 25, O. J. A.

Having regard to the provisions of sec. 25, O. J. A., the setting down of an appeal from a report in an action in the Chancery Division, to be heard at a sittings of Chambers in another Division, is a nullity.

[February 10, 1887.—*Ferguson, J.*]

THE defendants desired to appeal from a Master's Report in this action in the Chancery Division, and, in order to bring on the appeal before the report was confirmed, set it down for hearing at a sittings of Chambers in the Q. B. & C. P. Divisions to be held on Friday, the 4th February. The Judge who held Chambers on that day, declined to hear the appeal, and it was again set down and brought on before a Judge of the Chancery Division on Monday, the 7th February, after the report had become confirmed by lapse of time.

The defendants also moved to extend the time for appealing, in case the appeal should be regarded as improperly set down. There was no motion to strike the appeal off the list, but on the argument of the other motion the respondent objected to the regularity of the setting down.

P. McPhillips, for the appellants, relied on *Laidlaw v. Miller*, 11 P. R. 335, as shewing that the appeal could properly be set down in another Division than that to which the action belanged.

E. Douglas Armour, for the respondent, submitted that under the Ontario Judicature Act sec. 25, sub-sec. 2, an interlocutory motion, such as this could not be brought on except in the Division to which the action was attached.

The motion to extend the time for appealing was refused with costs; but on the question of the regularity of the setting down judgment was reserved, and was afterwards given as follows:

FERGUSON, J.—It is not disputed that it was necessary to set the cause down by way of appeal in proper time. The contention was that it having been set down in the Common Pleas Division of the Court, that was sufficient, if it be assumed that the setting down there was in good time. There was no pretence that the cause was set down in this Division in proper time, and the action is in this Division. Now, looking at the provisions of section 25 of the Judicature Act, I am unable to perceive that the fact of having set the cause down in the Common Pleas Division can be of any avail to the so called appellants. The existence of the motion to extend the time for appealing, no doubt threw the respondent off his guard in respect to moving to strike the cause off the list, and I think sufficiently excused him for not doing so. The cause will be treated as if not set down at all.

COMSTOCK V. HARRIS.

Discovery—Foreign party—Examination and production—Staying action.

When a party to an action who lives in a foreign country comes within the jurisdiction, service upon him of an appointment and subpoena, as in the case of resident litigants, is sufficient to compel his attendance ; and it lies upon the party so served to object at the time to the payment for conduct money.

It is unreasonable that books in constant use should be required to be brought from without the jurisdiction for the purpose of an examination, unless the examiner in the course of the examination rules that they are necessary.

Upon failure of the plaintiff to attend for examination, the action should not be stayed till he does attend ; it is sufficient to impose a stay for a definite time.

[February 14, 1887.—*Boyd, C.*]

THIS was an appeal by the plaintiff from an order of the Master in Chambers, requiring the appellant, who lived in Rome, in New York State, to attend for examination at Ottawa, at his own expense, and to produce at his examination there the books used in his business in Rome, and staying the action till the plaintiff should so attend, &c.

The plaintiff was served in Ottawa while there for a temporary purpose, on Wednesday the 12th January, with an appointment for his examination at the instance of the defendant before an examiner at Ottawa, on the following Saturday, the 15th January, and with a subpoena to attend and produce his books, which he had not with him, and was paid as conduct money \$1. The plaintiff did not, at the time he was served, make any objection to the amount paid, nor to the time fixed for the examination. On the evening of the same day he said to the defendant that he would attend, but he expressed a hope that the examination might be got through in time to allow him to take the afternoon train on Saturday for his home. Then on the Thursday he expressed the wish to have the examination on Friday, which the defendant's solicitor agreed to, provided it could be arranged with the plaintiff's solicitor and the examiner. On the same Thursday the plaintiff applied to the defendant to postpone the examination to a

future time as he wished to be at Rome on Saturday to meet a named person on business, and thereupon the plaintiff and defendant went to the defendant's solicitor's office, and an agreement for the postponement was drawn up and handed to the plaintiff that he might obtain the signature of his solicitors in order to the adjournment. The plaintiff took the document away, and shortly afterwards returned with it unsigned, saying that he would sign no paper, but would go away, and he went back to Rome and did not attend for examination, whereupon, upon the application of the defendant, the order appealed from was made.

Langton, for the appellant, contended, (1) that the subpoena and appointment were not sufficient to compel the attendance of the appellant. If Ottawa was the proper place for his examination, an order should have been made directing his examination at Ottawa; (2) that the conduct money paid was insufficient to retain the plaintiff at Ottawa at inconvenience to himself; (3) that the appellant should not have been ordered to produce his books, which were in constant use in his business at Rome; (4) that the stay was improper; it was practically dismissing the action for default of his attendance. He referred to *Bank of British North America v. Eddy*, 9 P. R. 399; *MacLennan's* Judicature Act, 2nd ed., 359.

Holman, for the respondent, referred to *Smith v. Greey*, 11 P. R. 345, and *Parker v. Meriden*, 7 C. L. T. 112.

BOYD, C.—The same general rule should apply when parties living in a foreign country come within the jurisdiction as in the case of resident litigants, and therefore the proceeding by appointment and subpoena was the proper one. Then comes the question of conduct money and convenience. A requisition to attend on an examination of this kind should take precedence of private matters of business. It lies on the person served with an appointment to object, and require further conduct money. The

evidence here shows that at the time of the service no objection was made on the score of convenience, or as to the amount paid. It was afterwards agreed that there should be an enlargement of the time, and that arrangement was satisfactory to the appellant until after he had seen his solicitors. The Master's order is substantially right, except as to the books. The order should be for the production of all books which are not in constant use. It is unreasonable to require all to be produced before it is seen whether they are necessary. If others should be required, the examiner should rule as to the necessity for their production, and adjourn the examination if he decides that they should be brought before him. There should be no stay of proceedings except for a month, which would be a reasonable time. In other respects the order should be affirmed, with costs in the cause to the respondent.

DOMINION S. & I. COMPANY V. KILROY.

Interpleader order—Order to produce—Motion for irregularity.

After delivery of an interpleader issue a party to it may take out a *præcipe* order for production by the opposite party.

Such order should be issued and the record passed in the principal office of the Court in Toronto, as no locality is pointed out by the usual proceedings in interpleader.

A notice of motion for irregularity should shew or refer to affidavits shewing what the irregularity is.

[February 15, 1887.—*The Master in Chambers.*]

THIS was an interpleader issue directed to be tried at Sandwich. The writ of summons and the writ of execution in the original action out of which the interpleader arose were issued in London, and from the office there the defendant issued on *præcipe* an order for production by the plaintiffs. This order the plaintiffs now moved to set aside upon the ground (not specified in the notice of motion) that it was irregular to issue the order in London, and that it should not have been issued on *præcipe*.

J. R. Roaf, for the motion.

Aylesworth, contra.

THE MASTER IN CHAMBERS.—There is nothing at all that I can trace to affix locality to this interpleader. The issue was directed to be tried at Sandwich. The order on *præcipe* to produce, which it is the object of this motion to set aside, was issued by the deputy at London. Where the interpleader order was made does not appear, if it have any significance.

No doubt when issue has been joined in interpleader, parties must be entitled to production, and therefore to the process to enforce production, and it seems so much a matter of course, that I do not see any reason why it should not be by a *præcipe* order.

I have said that there is nothing to distinguish locality. An order for an interpleader is issued. It will direct the issue to be tried at some certain place, but that does not affix locality to the proceedings in the action. Then the pleadings are interchanged between the parties, not filed any where, until the record is passed, and where must that be done?

Since these proceedings must of necessity be taken, and there is nothing to point to locality, the result seems to be that the principal office of the Court in Toronto is the office where the proceedings in the suit must be regarded as pending, and there it is that such rules as the present must be issued, and there the record must be passed.

It is objected that the notice of motion does not show either by reference to affidavits, or on its own face, what irregularity is hit at. I think in such a motion as the present this is a defect.

The position of an interpleader or of an issue on a garnishment does not seem to be adverted to in the rules.

I dismiss this motion, without costs. I think the affidavit on production should be filed in Toronto, and that the record should be passed there.

ADAMSON V. ADAMSON.

Writ of assistance—R. S. O. ch. 66, sec. 11.

The application of R. S. O. ch. 66 is not limited to purely common law actions pending in those Courts before the Judicature Act, but extends to all writs of execution; and a writ of assistance in execution of a decree of the Court of Chancery for the recovery of land, is a writ of execution within the meaning of sec. 11 of that Act, and is not in force after one year from the teste, if unexecuted, unless renewed.

[February 16, 1887.—*Boyd, C.*]

MOTION by the plaintiff for an order to return a writ of assistance to the Sheriff of Peel to enable him to amend his return thereto, the sheriff having returned that the writ had expired.

This was a suit begun by bill of complaint in the Court of Chancery before the Judicature Act. A decree awarding the plaintiff possession of the lands in question was made and the writ of assistance issued in execution of it. No time for the return was mentioned in the writ, and more than a year had elapsed when the sheriff made his return.

J. MacLennan, Q. C., for the plaintiff, contended that such a writ was in force until executed, and, therefore, that the return was erroneous.

Bain, Q. C., for the sheriff, argued that it was a mere writ of possession, and that it had expired for want of renewal.

BOYD, C.—It was asserted during the argument, and not disputed, that this was a mere action of ejectment, which was brought in the former Court of Chancery because of the provisions in the Administration of Justice Act, by which that Court was to have jurisdiction in all matters cognizable at law (R. S. O. ch. 40, sec. 86). The next section, sec. 87, appears to apply substantially to the present litigation, which was to establish the plaintiff's title to the

land in question and to recover possession. The last clause of that section provides that if upon the determination of any such suit it appears that the plaintiff is entitled to the possession of such real property, he may obtain an order against the defendant for the delivery of such possession, and writs of execution shall issue accordingly. This is in *pari materia* with the provisions in the Ejectment Act, R. S. O. ch. 51, secs. 34 and 36, by which if plaintiff succeeds he is to sign judgment and have execution for the recovery of the possession of the property, and for that purpose a separate writ of execution for the recovery of possession may issue, or one writ for that and the costs. As a part of the same general title (Administration of Justice) the next important Act is ch. 66 R. S. O., relating to writs of execution. I do not read this as limited to purely Common Law actions pending in those Courts, but as applicable to all writs of execution. For this I think sufficient authority exists in the language of the Statute, but a case in point is *Doe d. Hudson v. Roe*, 18 Q. B. 806. Sec. 111 of that Act provides that, except writs of *ca. sa.*, every writ of execution shall remain in force one year from the teste, and no longer if unexecuted unless renewed, &c. That appears to me conclusive of this case. This writ, which was issued in February, 1881, by whatever name called (whether writ of possession or writ of assistance) is one for the execution of the judgment, which orders delivery up of the land to the plaintiff. It is, therefore, a writ of execution within the meaning of the above section. If it be in every sense the old writ of assistance, that was a method of procedure similar in effect to a writ of possession at law. 1 *Turner & Venables' Pr.* 982; *Wy. Reg.* 254, says it is in the nature of a writ of execution or *hab. fac. pos.* The course of practice from the ordinary equitable process *in personam* to that *in rem* is adverted to by Lord Hardwicke in *Roberdeau v. Rous*, 1 Atk. 544, who said the delivery of possession may be enforced in person, which was the old way; but the writ of assistance to put persons in possession by way of injunction is of more modern date. The

details of the old procedure are laid down graphically by Dickens in his reports : *Dove v. Dove*, Dick. 617, &c. The former procedure by writ of assistance was introduced into this Province by the 8th order of January 7th, 1842, which is the original of G. O. 294. I can find no practice as to the period of the return of such writs, though I do not think it was of indefinite duration. In 1844 (26th March) General Orders in Chancery were passed here as to writs of execution against lands and goods, which were returnable as to goods in two months and as to lands in thirteen months. Writs of sequestration were also made returnable thereby in two months from the date thereof. Some light may be gathered favourable to my conclusion as to the old writ from the fact that the Judges required a special case to be made when delay occurred in applying for the order of possession : *Irving v. Munn*, 1 Ch. Chamb R. 240.

The result is, that I consider the sheriff justified in refusing to act on this spent writ, and he should have his costs of the motion. This may be a proper case to award a new writ of possession under the present practice : (R. 494), but it ought not to be done without notice, owing to the alleged change of parties in possession. The burden ought not to be cast on the sheriff, in the peculiar circumstances of this case, of dealing with the present occupants, who are not named as defendants.

REGINA V. CYR.

Conviction—Keeping bawdy-house—Uncertainty—Place where offence committed—Forfeiture of penalty—32 & 33 Vic. ch. 31, sec. 17—Costs.

Upon a motion on the return of a *habeas corpus* to discharge the prisoner, who was convicted of keeping a house of ill-fame :

Held, that the conviction was bad on its face for uncertainty in not naming a place where the offence was committed.

Held, also, that it was defective because it did not contain an adjudication of forfeiture of the fine imposed.

The Act 32 & 33 Vic. ch. 31, sec. 17, provides that the magistrate may condemn the party accused to pay a fine not exceeding, with the costs in the case, \$100.

Held, that the meaning of this is, that the amount of the costs in the case shall be deducted from \$100, and that the balance or difference shall be the utmost limit of the fine ; and that the conviction in this case, being to pay the sum of \$100 without costs, was therefore bad.

[February 3, 1887.—O'Connor, J.]

Motion for order discharging prisoner on *habeas corpus*.
Aylesworth for the prisoner.

E. F. B. Johnstone, Deputy Attorney-General, for the Crown.

O'CONNOR, J.—I think the evidence was abundantly sufficient to support the conviction ; but I also think the conviction is bad on the face of it. It is clearly uncertain. The conviction is for keeping a house of ill-fame on a stated day at the city of Ottawa. If the prisoner were charged again for an offence of the kind on the same day at the city of Ottawa, would this conviction be on the face of it a bar to further proceedings, as it ought to be ? No ; for *non constat* she may have kept more than one house of the same kind at the city of Ottawa at the same time ; and at all events the precise time is not material.

It would be no answer to an indictment, and a plea of the kind in a civil action would be demurrable. The nature of the offence is such that there is no difficulty in stating a place certain.

Another ground of objection urged by Mr. Aylesworth against the conviction was that it contains no expression

of forfeiture, that is, the prisoner is adjudged to pay a sum of money without adjudging a forfeiture thereof. According to *Paley on Convictions*, 6th ed., p. 264, *et seq.*, judgment of forfeiture seems to be necessary, but he refrains from examining into the authorities, "since," as he says, "it is now fully established that the judgment must contain both; and the form also prescribed by the 11 & 12 Vic. ch. 34, after the adjudication of the conviction, adds, 'and I adjudge the said A. B. for his said offence to forfeit and pay the sum of £——, to be paid and applied according to law.'" The form in the schedule to our statute, 32 & 33 Vic. ch. 32 (D.), is prescribed for imprisonment only; but the Act ch. 31 of the same session in its forms (I. 1), (I. 2), (I. 3), has the expression "forfeit and pay," and section 50 makes these forms applicable to all cases where no particular form is given by the particular Act or law creating the offence or regulating the prosecution for the same; but on the other hand, in cases where forfeiture is neither necessary nor proper and where only an order to pay money due by one person to another can be made, as in cases between master and servant, the forms (K. 1), (K. 2), are given, and they contain no expression of forfeiture. This Act and the forms are substantially the same as the British Act, 11 & 12 Vic. ch. 43, and its forms.

It appears to me, therefore, that the statutes and forms establish in this country "that the judgment should contain in form an adjudication of forfeiture as well as of conviction."

It was also objected that the fine imposed is \$100, without costs, contrary to the express provision of the statute. The 17th section of the Act, ch. 31, *supra*, provides that the magistrate "may condemn him" (the party accused) "to pay a fine not exceeding, with the costs of the case, \$100;" the conviction is to pay "the sum of \$100, without costs." Mr. Johnstone argued plausibly enough, and at first it seemed to me not unreasonably, that the conviction meant that the accused was to pay no costs and therefore nothing was to be added to the penalty to bring

the amount up to \$100, nor was there anything to be deducted, so that the accused was liable to the exact amount and limit of the statute, and that such is the meaning of the statute. But if that is the meaning it is certainly not the expression of the statute.

The expression of the statute is, "a fine not exceeding, with the costs in the case, \$100." It is not with costs, if any, to be paid by the offender.

The statute is, "*with the costs in the case.*" The expression is direct, distinct, and positive, and it appears to me the meaning is that the amount of the fine may be such that any costs in the case being added thereto shall not together exceed \$100.

In other words, the amount of the costs in the case shall be deducted from \$100, and the balance or difference shall be the utmost limit of the fine. It may be less, but cannot be more than that amount. If there were no costs in the case the conviction ought, I think, to shew that fact; and as that does not appear I think it is to be presumed that there were costs in the case, and it seems that the statute clearly implies that there are costs in the case to be deducted from the \$100.

Besides, the expression of the conviction is in terms contradictory of the expression of the statute.

The prisoner will be discharged.

RE RAINEY LAKE LUMBER COMPANY.

Appeal—Divisional Court—Winding-up proceedings—45 Vic. ch. 23, sec. 78.

Pending proceedings under an order for the winding-up of a company under 45 Vic. ch. 23 (D.), the Union Bank filed a petition praying that the liquidator might be ordered to deliver up certain lumber claimed by the bank. The petition came on to be heard before a Judge in Court, and was adjourned by him for the sake of convenience before the Judge holding the Port Arthur Assizes, who heard the evidence orally and pronounced judgment thereon.

Held, that the proceeding at Port Arthur was not the trial of an action, and therefore and also having regard to the provisions of 45 Vic. ch. 23, sec. 78, (D.), that no appeal lay to the Divisional Court.

[February 21, 1887.—*The Chancery Division.*]

PENDING proceedings under an order of the High Court of Justice, Chancery Division, for the winding-up of this company under 45 Vic. ch. 23 (D.), the Union Bank, under sec. 43 of the Act, filed a petition praying that the liquidator of the company, appointed in the winding-up proceeding, should be ordered to deliver up a quantity of lumber claimed by the bank. This petition was opposed by the liquidator, and when it came up for hearing before the Chancellor in Court on a Tuesday, it appeared that the parties desired to cross-examine deponents on affidavits filed, and that a great deal of evidence would necessarily be taken. The Chancellor accordingly referred the issues arising upon the petition to the Judge holding the Assizes at Port Arthur, which was not far from the place where most of the witnesses were, and the petition then coming on before O'Connor, J., at Port Arthur, he heard the evidence orally, and gave judgment upon the petition in favor of the Union Bank.

The liquidator desiring to appeal from the order of O'Connor, J., set it down for re-hearing at the Sittings of the Divisional Court beginning on Thursday, the 17th February.

A motion was now made on behalf of the Union Bank to strike the case off the list, on the ground that no appeal lay to this Court.

George Bell, for the motion. 45 Vic. ch. 23, sec. 43 (D.) expressly provides for the course followed here of obtaining upon summary petition an order upon the liquidator for delivery of property, and enacts that the procedure shall not be by suit, and sec. 78 of the Act provides for an appeal from an order or decision of the Court in any proceeding under the Act by leave of a Judge of the Court appealed from, which appeal in Ontario is to be to the Court of Appeal. This proceeding is not an action within the meaning of sec. 91, O. J. A., and therefore the provisions of Rules 471 and 510, O. J. A., do not apply to it, and no appeal lies to the Divisional Court as from the judgment on the trial of an action.

J. R. Roaf, contra. The trial was not a proceeding under the Winding-up Act. It was not the petition that was referred to be tried, but certain issues raised upon it, and directed to be tried under the rules of the High Court of Justice. It was in effect an action sent down for trial as if under the provisions of sec. 20 of the Winding-up Act.

BOYD, C.—The most that can be said is that this was an issue growing out of the petition. It may be in the nature of an action, but is not an action within the Judicature Act and Rules. The issue was directed to be tried, not under the rules, but in the exercise of the inherent jurisdiction of the Court to direct issues in proper cases. We are all agreed that there is no jurisdiction to entertain the matter here. The proceeding originated under the Winding-up Act, and as it seemed convenient to have the issues raised tried upon oral evidence, a reference was made to the Judge holding the Sittings at Port Arthur. They are issues developed out of the petition, and not issues in an action under the Judicature Act. Sec. 78 of the Winding-up Act shews that the appeal is to the Court of Appeal. Judicature Rule 471 occasions some slight doubt. It says that an appeal may be taken where proceedings are directed by any statute to be taken before the

Court, and in which the decision of the Court is final. Here it is not final; there is an appeal, if a Judge gives leave, to the Court of Appeal. The result is that the case must be struck out with costs, without prejudice to an application to a Judge for leave to go to the Court of Appeal.

PROUDFOOT and FERGUSON, JJ., concurred.

Appeal struck out.

IRVING ET AL. V. CLARK ET AL.

*Costs, security for against one of several plaintiffs—Joinder of plaintiffs—
Causes of action.*

The rule that security for costs should not be ordered where it could be only against one of several plaintiffs does not now universally govern, since the law as to joinder of plaintiffs has been changed by Rule 89, O. J. A.

Quære, whether the rule was ever applicable to the ordering of security for costs against an insolvent plaintiff suing for the benefit of another person.

And where one plaintiff was suing to enforce a mechanic's lien against certain land, and the other, an insolvent, suing on another's behalf to set aside a sale of the same land, security for costs was ordered against the latter plaintiff alone.

[February 21, 1887.—*The Master in Chambers.*]

THIS was a motion by the defendants for security of costs against the plaintiff Irving.

The facts appear in the judgment.

S. R. Clark and *R. A. Dickson* for the motion.

Dewart contra.

THE MASTER IN CHAMBERS.—This is a motion to compe security for the defendants Clark and Smith's costs in this

cause. Both the plaintiffs are within the jurisdiction. The motion is as against the plaintiff Irving on the alleged ground that he, being insolvent, is put forward by Mr. Hall, who is really entitled, with a view to escape liability to costs, in case of the plaintiff's failure in the action.

In the case of absence from the jurisdiction it has long been the law—it is certainly as old as the Term Reports—that where there is more than one plaintiff, although all but one of the plaintiffs should reside abroad, yet if one of them reside in the jurisdiction, no security for costs can be ordered. This was the law where absence from the jurisdiction was the alleged ground for security. Whether it applies by analogy at all where the ground for the application is that one of two plaintiffs is really without any interest in the subject, and being insolvent is put forward by the party interested, that the latter may escape liability to costs in case of failure, that is, whether, where security is moved for against one of two plaintiffs on the latter ground, it would be an answer that there is another plaintiff not open to the motion, I should think extremely doubtful.

However, this was as things existed at the Common Law, and for reasons which I will give it cannot now universally apply in the present state of the practice.

At the Common Law any number of plaintiffs might have joined in a suit, but they must have had a joint interest in the subject of it, and there could not have been failure of some of the plaintiffs and success by the others—all must have succeeded or all must have failed. And their liability to defendants' costs in case of failure was in like manner joint. Each plaintiff was liable for the costs of all.

And so the Courts viewed it, that if one of the plaintiffs was within the jurisdiction security could not be ordered against those who were abroad, because the one in England was liable to the whole of defendants' costs against all the plaintiffs.

The law as to the joinder of plaintiffs, which was the foundation of this decision, is now quite different. It is now under Rule 89, which is in these words :

“All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally, or in the alternative. And, without any amendment, judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief for such relief as he or they may be entitled to. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person or persons who shall not be found entitled to relief, unless the Court in disposing of the costs of the action shall otherwise direct.”

This is very wide, and needs the illustration of decisions to define the boundaries on either hand. I cite two cases, both in the Court of Appeal, *Booth v. Briscoe*, 2 Q. B. D. 496, and *Gort v. Rowney*, 17 Q. B. D. 625, which I think shew the view of the Courts.

It is enough for me to say now that it is plain that several plaintiffs may seek relief against the same defendants in cases where there is not the least trace of a joint interest in the plaintiffs, where the failure of one plaintiff will not affect one way or another the claim of any other plaintiff, and where by consequence the right and liability to costs in the plaintiffs is as much several as though those plaintiffs had each brought a separate action. The case in 17 Q. B. D. 625, above cited, deals with this latter point

I give the head-note of the case:

“Two plaintiffs joined in one action, claiming for separate and distinct causes of action. The case was referred, with power to the arbitrator to enter judgment, the costs of the cause to abide the event. The arbitrator found in favour of one plaintiff, and against the other, and entered judgment accordingly. On an application to review taxation of costs, *Held*, reversing the order of Lord Coleridge, C.J., and Fry, L. J., that the successful plaintiff was entitled to recover from the defendant the whole of his general costs of the action, and the defendant was only entitled to recover from the unsuccessful plaintiff the costs occasioned by joining such plaintiff.”

It cannot, therefore, now be universally true, that the residence of one plaintiff in Toronto is necessarily an answer to a claim for security for costs by the defendant as against his co-plaintiffs, on the ground that the latter are out of the jurisdiction.

Nor can it be that any analogous argument drawn from the old rule as to plaintiffs must necessarily be an answer to the defendant, where for any cause security is sought by the defendant as to one plaintiff only, that such cause does not apply to the other plaintiffs. One plaintiff is not now always liable to the defendants' costs as against all the plaintiffs, as used to be the case at Common Law when plaintiffs failed.

It is necessary therefore to examine what it is that the plaintiffs seek in this suit.

It is brought by Irving and Brown against three defendants, Clark, Keep, and Smith. Irving as owner of the equity of redemption claims against all the defendants to redeem certain property from mortgages thereon. The mortgages were to Clark, who is charged by the plaintiff with certain ill conduct in respect of these mortgages. The other two defendants are charged as holding with notice and without consideration under a wrongful sale by Clark under his mortgages. It is not necessary to enter here into further detail. Plaintiff Brown claims that there is due to him \$200, interest and costs, &c., in respect of a mechanic's lien charged upon the said lands and registered the 15th day of April, 1886. He seeks to have the land applied to the payment of it. I do not see that Brown has anything to do with redeeming, setting aside sales, &c. His claim is against the land for the amount of his lien in whomsoever the land may be, and that is all his claim.

What has Brown to do with Irving's success or failure? Nothing. What has he to care whether or not Irving is allowed to redeem? And so Irving's success or failure would not affect Brown, except it may be to this extent, that in case both plaintiffs succeed, then Brown would

succeed against Irving, who will have to discharge, out of the property, Brown's lien.

I think, therefore, that if Brown succeeds in the suit, for his claim, he will be entitled to full costs against the defendants, and will not be liable to any costs of the defendants which the defendants may be entitled to against Irving, should Irving fail. And on Irving's failure, which is quite consistent with Brown's success, Irving will be *primâ facie* liable to defendants' costs under the latter part of Rule 89. The probability is, that the costs in litigating Irving's claim will be far greater than the same costs upon Brown's claim.

It is not unimportant to observe that the plaintiff Brown had at the commencement of this suit, and has now, a pending suit brought in his own name for his mechanic's lien.

It is quite plain, and is not denied, that Irving is suing for Hall, having no interest himself, he holding as Hall's trustee, and it is also plain that he is insufficient to meet the costs of the defendants against him, should he (Irving) fail in the suit. Mr. Irving is a clerk in Mr. Hall's office.

For these reasons I order security for costs of the defendants Clark and Smith against the plaintiff Irving.

Costs in the cause.

POWELL V. PECK ET AL.

Leave to appeal—Discretion—49 Vic. ch. 16, sec. 39 (O.)

Leave was given to appeal from the decision of Proudfoot, J., 12 O. R. 492, because of the importance of the question and of conflicting decisions.

An appeal now lies to a Divisional Court from a discretionary order, by virtue of 49 Vic. ch. 16, sec. 39 (O.), but that enactment has not altered the rule that a very strong case must be made out to induce the Court to reverse such an order.

[January 10, 1887—*Proudfoot, J.*]

[February 23, 1887—*The Chancery Division.*]

THIS was a motion by the plaintiff for leave to appeal to the Court of Appeal from the decision of Proudfoot J., 12 O. R. 492, as to the rate of interest to be allowed after maturity of a mortgage.

The application was rendered necessary by the plaintiff having failed to give notice of appeal in due time, and he now filed an affidavit excusing his delay.

E. T. English, for the plaintiff.

Beck, for the defendant.

PROUDFOOT, J., did not deem the excuse given for the delay sufficient, but gave leave to appeal because of the importance of the question involved, and because the Chancellor in a case of *London and Canadian L. & A. Co. v. Smythe*, 7 C. L. T. 17, had come to a different conclusion, and taken a different view of the case of *St. John v. Rykert*, 10 S. C. R. 278, on which the decision in this case was grounded.

An appeal by the defendant from the order giving leave to appeal was brought before the Divisional Court.

Beck, for the appellant. There is an appeal in this case although the matter was in the discretion of the Judge, because by 49 Vic. ch. 16, sec. 39 (O.), the words "except orders made in the exercise of such discretion as by law

belongs to him" are struck out of sec. 36, O. J. A., and there is now an appeal to the Divisional Court from every rule, order or decision made by a Judge in Chambers. As to reversing a discretionary order, see *Huxley v. West London Extension R. W. Co.*, 17 Q. B. D. 373. In this case, as the Judge found, no valid excuse was given for the long delay from the 29th of September, 1886, to the 10th of January 1887. The cases are very stringent against allowing appeals after the time for appealing has expired; *Craig v. Phillips*, 7 Ch. D. 249; *McAndrew v. Barker*, 7 Ch. D. 701; *Curtis v. Sheffield*, 21 Ch. D. 1; *Re New Callao*, 22 Ch. D. 484; *Re Laws*, 9 P. R. 72; *Miller v. Brown*, 9 P. R. 542; *Wilby v. Standard*, 10 P. R. 34. There is no authority for giving leave to appeal because of the importance of the question; if it is important some other litigant will carry it to the higher Courts; this defendant should not be obliged to stand the expense of litigating the question. The learned Judge felt himself bound by the case in the Supreme Court of Canada, and plaintiff will have to go to the Privy Council to overrule that decision. The case decided by the Chancellor was in Chambers, and does not conflict with the decision in this case.

E. T. English, for the respondent, was not called upon.

BOYD, C.—I do not see how we can possibly interfere in this case. No Judge is more strict than my brother Proudfoot in holding parties to their strict legal rights; and where he has exercised his discretion in this way, and where moreover the decision from which he gives leave to appeal is his own, a very strong case must be made out to justify our interference. The grounds upon which he gave the leave are weighty and such as justified his action. The amending Act 49 Vic. ch. 16, sec. 39, (O.), makes an appeal possible in a matter of this kind, where before it would have been impossible, but it does not make it more easy to induce the Court to reverse a discretionary order. An appeal in such a case if set down will now be heard, whereas before the amendment it would not lie at all, and would

have been struck out. The order should be affirmed with costs.

FERGUSON, J.—I concur in what the Chancellor has said. *St. John v. Rykert* was a very peculiar case, and it is doubtful if the Supreme Court would come to the same conclusion in this case. It is possible also that the Court of Appeal may be able to distinguish the cases.

PROUDFOOT, J., was not present.

Appeal dismissed, with costs.

HUNTINGTON V. ATTRILL.

Action on foreign judgment—Staying proceedings—Appeal in foreign country.

An action on a foreign judgment was stayed pending an appeal in the foreign state from the judgment sued on, although no stay of execution upon the original judgment was imposed by the foreign court. Terms as to diligence in prosecuting the appeal and preservation of the defendant's property in Ontario in *statu quo* were annexed to the order.

[February 21, 1887.—*The Common Pleas Division.*]

THIS was an action upon a judgment recovered by the plaintiff against the defendant in the Supreme Court of the State of New York for \$100,000. It was alleged that the defendant had assets in Ontario worth much more than \$200, the sum mentioned in Rule 45 (e), which might be rendered liable to the judgment sought to be recovered in this action.

After the service upon the defendant of the writ of summons and statement of claim, a motion was made on his behalf to stay all proceedings in this action until the determination of an appeal which he intended to prosecute from the judgment sued upon to the Court of Appeals of

the State of New York. It was shewn by the plaintiff that there was no stay of execution upon the judgment in the foreign court. The Master in Chambers made the order asked, staying all proceedings, upon the terms that the appeal to the foreign court should be prosecuted with diligence, that the plaintiff should be allowed to register a *lis pendens* against certain lands of the defendant in Ontario, which he had settled upon his wife and son, so as to bind the interest of the wife and son, and that the defendant should pay into Court such sum as should be ascertained by a named referee to be the value of his personal property within Ontario.

From this order the plaintiff appealed to a Judge in Chambers, who enlarged the appeal before the Common Pleas Divisional Court, where it now came on to be heard.

Kingsmill and *H. Symons*, for the appellant, referred to *Piggott* on Foreign Judgments, 52; *Vauquelin v. Bouard*, 33 L. J. C. P. 78; *Henderson v. Henderson*, 3 Ha. 100; *Faber v. Hovey*, 19 Am. Rep. 398; *Plummer v. Woodburne*, 7 D. & R. 25; 4 B. & C. 625; *Russell v. Smyth*, 9 M. & W. 810; *Jones v. Williams*, 13 M. & W. 420; *McHenry v. Lewis*, 21 Ch. D. 202.

Robinson, Q. C. and *Aylesworth*, for the respondent, were not called upon.

THE COURT affirmed the order of the Master in Chambers, holding that it was a proper exercise of discretion to stay the proceedings pending the final determination of the foreign action.

RE DOYLE V. HENDERSON.

Rescinding order—Powers of Judge—Appeal.

A motion made to the Master in Chambers on the 27th October, 1886, to rescind his own *ex parte* order of 13th October, 1886, allowing the executrix of the plaintiff to issue execution for the costs of a motion for prohibition, was referred to a Judge in Chambers. The motion was made after execution had been issued and placed in the sheriff's hands. *Held*, that neither the Master nor the Judge in Chambers had the power to rescind the order; and the motion was too late to be treated as an appeal.

McNabb v. Oppenheimer, 11 P. R. 214, followed.

Stanior v. Evans, W. N. Dec. 25, 1886, p. 210, considered.

[March 1, 1887.—*Rose, J.*]

On the 2nd of February, 1886, the defendants moved for an order for a writ of prohibition. The application was refused with costs on the 12th of March.

This order was confirmed by the full Court on the 29th of June, the motion by way of appeal being dismissed, with costs.

On the 13th of October, 1886, the Master in Chambers, upon an application by the executrix of Doyle, ordered execution to issue, and executions were placed in the sheriff's hands.

On the 27th of October, subsequent to the executions being placed in the sheriff's hands, the defendants served a notice of motion by special leave of the Master, and returnable before him, for an order setting aside the order of the 13th of October, and the executions issued thereunder, and for a stay on several grounds.

The motion coming on before the Master, and objection being raised as to his right to rescind his own order, (see *McNabb v. Oppenheimer*, 11 P. R. 214), he enlarged the motion before a Judge sitting in Chambers.

V. Mackenzie, Q. C., for the motion.

W. H. Blake, contra.

ROSE, J.—The only ground argued was that prior to the taxation of costs under the order of the 12th of March, the proceedings had abated by the death of Doyle.

Of this fact it is said the defendants were aware prior to their appealing to the Divisional Court, but that the solicitors for Doyle were not apprised of it until after that time, and were not aware of the date of the death at the time of the making of the order of the 13th of October.

The defendants are most unfairly endeavouring to avoid the payment of costs to which they have put the plaintiff and his solicitors, and should receive no assistance.

There were two orders for the payment of costs standing at the time of the order of the 13th of October, unappealed and not moved against.

Upon their production and the suggestion of the death of Doyle and the appointment of an executrix, the order of the 13th of October was properly made—no other facts appearing.

The order of the learned Master was taken out and acted upon before this motion was made. He had, therefore, in my opinion no power to rescind it. See *McNabb v. Oppenheimer*, and cases there cited.

I have seen the case of *Stanior v. Evans*, reported in the Weekly Notes, December 25th, 1886, p. 210, a judgment of North, J., in which he is stated to have held that on the facts of that case he had jurisdiction to reform his own order.

The exact language of the learned Judge is not given, and I think his order then made was sustainable without in any way rescinding or amending his former order.

He had made an order for the payment into Court by a trustee of two sums of money—to wit: £1,596 17s. and £660, allowing him to deduct from the latter sum his costs. It being made to appear that he was financially irresponsible, and that the £660 were in the hands of his solicitors, they were ordered to pay it into Court, and not allowed to take advantage of the permission granted in the former order to the trustee to retain the costs out of such sum.

It does not appear that the order had been acted upon.

If, however, the decision cannot be fairly read as consistent with the view that a Judge has no power to rescind

his own order after it has been acted upon, I must, in the light of the cases I have above referred to, refuse to follow it.

If I am to treat this motion as an appeal from the learned Master to myself in Chambers, it is too late, having been made after the time limited by rule 427.

In either view this motion fails, and must be dismissed with costs.

I am not, therefore, called upon to determine the effect upon the proceedings of the death of Doyle.

The defendants appealed from this decision to the Queen's Bench Divisional Court, and the appeal was argued and dismissed, with costs, on the 20th May, 1887.

RE THE WESTERN FAIR ASSOCIATION v. HUTCHINSON.

Prohibition—Division Court—Corporation—Question of fact.

Motion for prohibition to a Division Court on the ground that the Western Fair Association did not exist in fact or in law, and could have no title to the Grand Stand in dispute, and therefore the Court had no jurisdiction to enforce the judgment in the suit.

Held, that the question of corporation or no corporation was one of fact, and that the decision thereon was not reviewable in prohibition.

[March 1, 1887.—*Rose, J.*]

THIS was a motion for a writ of prohibition to a Division Court, on the ground that the Western Fair Association does not exist in fact or in law, and could have no title to the Grand Stand in dispute, and that therefore the said Division Court had no jurisdiction to enforce the judgment in the said suit.

Aylesworth, for the motion.

W. H. P. Clement, contra.

ROSE, J.—There has been a trial and finding by a jury in favour of the Association. The notice disputing objects "that the said plaintiffs are not a corporation empowered to sue."

The finding of fact and in law must have been against the defendants.

A motion for a new trial was refused on the ground of estoppel by a letter written by the defendants, and the dealings between the parties.

I do not stop to examine the grounds upon which the learned Judge ruled there was an estoppel. I do not say whether I could have so found.

If the question is corporation or no corporation, it is a question of fact, and must, under the old common law rules, have been raised by plea; *nul tiel corporation* would have been the proper plea: see *Berkeley Street Church v. Stevens*, 37 U. C. R. 9.

A finding on such an issue is certainly not reviewable upon a motion for prohibition.

The note of the learned Judge's judgment does not say that the Association are not incorporated, nor does the affidavit of Mr. Macdonald, solicitor for the Association, in terms admit such fact.

The applicant's solicitor states that they are not, but that, as I have said, was a question of fact which was raised by the notice.

It seems to me this motion amounts to a motion against the ruling of the learned Judge and the finding of the jury, as the Court certainly had jurisdiction to enter upon the enquiry.

I think the motion fails and must be dismissed with costs.

This judgment was affirmed on appeal by the Queen's Bench Divisional Court on the 16th May, 1887.

[NOTE.—In *Re Macfie v. Hutchinson*, Rose, J., on the 2nd April, 1887, decided that the determination by a Division Court Judge of the question, depending upon the construction of certain statutes, whether a medical health officer of a city was an employee within the meaning of R. S. O. ch. 47, sec. 125, was reviewable on a motion for prohibition.]

WRIGHT V. WRIGHT.

Interlocutory costs—Staying proceedings—Trespass.

Where the plaintiff is acting in good faith his action should not be stayed for non-payment of interlocutory costs ; and an action of trespass is in that respect in no way different from any other.

Stewart v. Sullivan, 11 P. R. 529, followed.

[March 1, 1887.—*Rose, J.*]

THIS was an appeal by the plaintiff from an order of the Local Judge at Cobourg staying proceedings until payment by the plaintiff of the costs of a motion and order setting aside a jury notice and notice of trial, they having been set aside upon the ground of irregularity in having been served before the defendant had delivered his statement of defence.

Beck, for the appeal.

W. H. P. Clement, contra.

ROSE, J.—When the appeal came on I was desirous of knowing the ground upon which the learned Judge proceeded, and he has very kindly certified as follows :

“ I certify that I refused the application to dismiss this action on the ground that the plaintiff had in good faith made such efforts to get down to trial as entitled him to a further opportunity of doing so.

I made his payment of costs previously imposed a condition precedent to his proceeding further, because in my judgment a defendant in an action of trespass ought to be protected throughout from any risk as to costs beyond those actually necessary to the trial of the dispute, *i. e.*, the costs of the cause.

I thought the reasoning on the authorities for not imposing such terms in actions on contract did not apply here ; and in the absence of authority as to such actions as this I gave effect to the principle which I thought ought to prevail.”

When the learned Judge gave judgment the case of *Stewart v. Sullivan*, 11 P. R. 529, had not been decided.

I there endeavoured to collect the authorities and state the result.

Good faith appearing, I do not think consistently with that decision the action should have been stayed for the non-payment of interlocutory costs.

I find no authority for placing parties in an action of trespass on any different footing to that occupied in other actions.

The learned Judge treated the matter as one of first impression. His opinion is entitled to the greatest respect, and I should hesitate to differ did I not feel bound by my opinion in *Stewart v. Sullivan*.

In the view I take the motion below should have failed, and the plaintiff is entitled to his costs of such motion and of this appeal, which may be set off against the costs directed to be paid by the plaintiff.

If any surplus is coming to the plaintiff, it will be costs in the cause to the plaintiff in any event of the cause.

ANDREWS V. CITY OF LONDON.

Costs, scale of—"Costs to abide the event"—Trial—Rule 511—Set-off.

The parties by consent allowed a verdict for the plaintiff for \$1 to be taken before the Judge at the assizes, to be altered according to the result of a reference agreed upon, and also agreed that the costs should abide the event. The action was for damages for negligence, and the award was in favour of the plaintiff for \$85. A question having arisen as to the scale of costs ;

Held, following *Watson v. Garrett*, 3 P. R. 74, and *Hyde v. Beardsley*, 18 Q. B. D. 244, that "costs to abide the event" does not mean that the plaintiff, if successful, shall necessarily have full costs, but that he shall have such costs as, under the statutes and rules of court, a plaintiff recovering the amount that he recovers by the event is entitled to.

Held, also, following *Cumberland v. Ridout*, 3 P. R. 14, that the final judgment by means of the reference was to be regarded as obtained without a trial, and the costs therefore depended upon Rule 511, under which the taxing officer was directed to proceed.

There should be no set-off of costs ; such a result is not contemplated by Rule 511, and it is not a fair construction to incorporate with it the provisions of R. S. O. ch. 50, sec. 346, that section being restricted to a case where there is a trial.

White v. Belfry, 10 P. R. 64, commented upon.

[March 5, 1887—*The Chancery Division.*]

THIS was an action for damages for negligence in overflowing certain land with water. At the Assizes a verdict was by consent entered for \$1, subject to be increased according to the result of a reference also agreed to. The agreement was also made that the costs should abide the event. The reference resulted in an award of \$85 in favour of the plaintiff, and a question then arose as to the scale of costs. The taxing officer ruled that the costs should be on the lower scale, but Proudfoot, J., on appeal reversed this, giving the following judgment :

"I am unable to distinguish this case from *Garnett v. Bradley*, 3 App. Cas. 944, and *McGarvey v. Strathroy*, 11 P. R. 57, which determine that the *event of the cause* is irrespective of the amount of damages, and that the marginal rule applicable to costs where a jury has tried the case does not apply. The right to costs must turn on the words of the reference 'to abide the event,' and that has been in favour of the plaintiff. The plaintiff is entitled to costs on the higher scale, with costs of appeal."

The defendants appealed from the order of Proudfoot, J., and the appeal was argued on the 17th of February, 1887.

Shepley, for the appellants.

Aylesworth, for the respondent.

The following authorities were referred to:—*Garnett v. Bradley*, 3 App. Cas. 944; Rules 428 (a), 428 (c) and sec. 49, O. J. A.; *Whitehead v. Tait*, 3 C. L. T. 122; *McGarvey v. Strathroy*, 11 P. R. 57; *Russell on Awards*, 6th ed. p. 76; *Arch. Q. B. Prac.*, 12th ed. p. 1702; *Fergusson v. Davison*, 8 Q. B. D. 470; *Stooke v. Taylor*, 5 Q. B. D. 569; *Ellis v. Desilva*, 6 Q. B. D. 521; *Lowe v. Holme*, 10 Q. B. D. 286; *Lund v. Campbell*, 14 Q. B. D. 821; *Hawke v. Brear*, 14 Q. B. D. 841; *Johnson v. Morley*, 9 U. C. L. J. O. S. 263; *G. W. Advertising Co. v. Rainer*, 9 P. R. 494; *Wimshurst v. Barrow Shipbuilding Co.*, 2 Q. B. D. 335; *Wilson v. Roberts*, 11 P. R. 412; *White v. Belfry*, 10 P. R. 64.

BOYD, C.—The parties have by consent let a verdict be taken before the Judge at the Assizes, which is to be altered according to the result of the reference agreed upon. Though the cause and all matters in difference were referred, it does not appear that there are matters in difference outside of the action or that anything has been awarded in respect of any claim but the matters complained of in the action. The parties made their own agreement as to costs, which were to abide the event. This, as said by Richards, J., in *Watson v. Garrett*, 3 P. R. at p. 74, does not mean that “the plaintiff if successful shall have full costs no matter how small a sum he may have had awarded to him. It means no more than this, that he shall have such costs as under the statute and rules of Court a plaintiff recovering the amount that he recovers by the event is entitled to.”

Such a reference as this is to be regarded as one in which final judgment is obtained without a trial, according to the latest decision in *Cumberland v. Ridout*, 3 P. R. 14; and the costs, therefore, depend on rule 511. See also *Hyde v.*

Beardsley, 18 Q. B. D. 244. The award is for \$85, which is *prima facie* within the competence of the County Court and will carry costs on that scale only unless the course indicated in rule 511 being taken, the taxing officer is satisfied that they should be on the higher scale. But I do not see how we can go any further and allow a set-off of costs, as was done in *White v. Belfry*, 10 P. R. 64. Rule 511 does not carry such a result as this, and it is not a fair construction, in my view, to incorporate with it the provisions of R.S. O. ch. 50, sec. 347. That section is restricted to a case where there is a trial, and does not apply here.

The taxation should be had under rule 511 as indicated; but as success is divided on this appeal, as well as because of the confusion which still exists on the important subject of costs, I think that no direction should be given as to the costs of appeal.

FERGUSON, J.—In this case a verdict was by consent entered for \$1, which was subject to be increased, &c., upon a reference to arbitration, which was also by consent. No jury was empanelled if that act could have made any difference in respect to the present position of the parties. The amount of the award is \$85. In the document of reference it is stated that the costs should “abide the event.” The question now is as to these costs. The parties are taxing costs and entering judgment.

Marginal Rule 511 provides that in every case in which judgment is entered without a trial, or the decision of the Court or a Judge, or order as to the costs, and where the amount of the judgment *prima facie* appears to be within the jurisdiction of an inferior court, the taxing officer shall not tax full costs of the High Court without proof on affidavit to his satisfaction that the suit was properly instituted therein, and if properly within the jurisdiction of the County or Division Court, then that the taxation shall be on the scale of fees in such Courts, subject to revision as in other cases, and it appears to me the present case falls within the provisions of this Rule.

It was contended that there had been a trial and that the verdict was as a verdict of a jury, and that being subject to be increased, &c., by the award, the amount of the award should be considered as being a verdict for that sum. The question here is as to whether or not there was a trial, for if there was a trial the case could not fall under the provisions of this rule 511. The case *Cumberland v. Ridout*, 3 P. R. 14, decides that (at all events for the purposes of the statute then under consideration) what took place in the present case would not be a trial; and in so deciding the Court seems to have declined to follow *Bonter v. Pretty*, 9 C. P. 273, in which the opposite had been the holding. The cases of *Morse v. Teetzell*, 1 P. R. 375, and *Elmore v. Colman*, 4 O. S. 321, are, as it appears to me, to the same effect as *Cumberland v. Ridout*. In *Elmore v. Colman* Chief Justice Robinson said: "The Legislature surely meant to use the word *trial* in such a sense as to include the hearing of the cause."

As I have already indicated, I am of the opinion that there has been in this case no trial; and it is not asserted that there is or has been any decision of the Court or a Judge or any order as to costs. The case then falls under rule 511, as I think.

It was contended that inasmuch as by consent there was a reference containing the provision that the costs should "abide the event," and the event being in favor of the plaintiff, he became entitled to full costs of suit by virtue of what was the equivalent of a contract. In the case of *Hyde v. Beardsley*, 18 Q. B. D. at p. 247, the words "abide the event," have received a construction which is "abide the event according to law," and the case was decided according to such construction.

Rule 572 provides for a set-off of costs as under the Common Law Procedure Act, but the Rule applies only to cases of trial by jury, and there is no such provision in in Rule 511. I do not see upon what ground the set-off was directed in the case of *White v. Belfry*, 10 P. R. 64.

I think the taxation should be under Rule 511 and I do see any authority for a set off of costs.

I agree that there should be no costs of this appeal.

PROUDFOOT, J.—It is remarkable that neither on the argument before me nor on that before the Divisional Court, was Rule 511 referred to.

The counsel should be much indebted to the Chancellor and my brother Ferguson for rooting out this rule, which is so entirely applicable. I agree in the result of the judgments just pronounced.

TEMPERANCE COLONIZATION SOCIETY V. EVANS ET AL.

Jury notice—Money demand—Equitable cause of action—Severing issues—Rule 256, O. J. A.—Trial Judge—C. L. P. Act, sec. 255.

The action was brought (1) for the recovery of instalments of money due under a scrip contract, and (2) for a declaration of the plaintiffs' right to specific performance of the part of the contract as to settlement duties, the time for performance not having yet arrived.

Held, PROUDFOOT, J., dissenting, a proper case in which to exercise the power under Rule 256, O. J. A., of severing the action so as to have that part of it which is preliminary tried first, the defendants having a *prima facie* right to a jury as to the main matter in controversy, the (1) claim; while the (2) claim could be better tried without the intervention of a jury.

The defendants' jury notice, which had been struck out, was restored, and the whole action was left to the Judge at the trial to try partly with a jury and partly without a jury, or altogether without a jury, as he might think advisable.

Per PROUDFOOT, J.—The Court or a Judge has power by the C. L. P. Act, sec. 255, to act before the trial by striking out the jury notice, and the power should be exercised when it is perfectly clear that the issues are such that they cannot be properly tried by a jury; the question should not in every case be left to the trial Judge to determine.

[January 13, 1887.—*Proudfoot, J.*]

[March 5, 1887.—*The Chancery Division.*]

AN appeal by the plaintiffs to a Judge in Chambers from an order of the Master in Chambers refusing to strike out the jury notice filed by the defendants.

The facts and the contentions with regard to them sufficiently appear in the judgment of Proudfoot, J.

A. H. Marsh, for the plaintiffs.

Hoyles, for the defendants.

PROUDFOOT, J.—This is an appeal from an order of the Master in Chambers refusing to strike out a jury notice.

I think it is a case more fitted for trial by a Judge alone than with a jury.

Even upon the pleadings, without any other circumstances, I do not think that *Conmee v. Canadian Pacific R. W. Co.*, 12 A. R. 744, would require me to hold that the defendants have a right to a jury. For although one part of the ground of action, viz., that for the recovery of the instalments on the scrip contracts, would have been properly the ground of a common law action; yet there is a further ground, viz., that which seeks a declaration of a right to a specific performance of the contract as to the settlement duties, which would not have been within the competence of a common law court. This agreement is not one that can be answered in pecuniary damages, or upon which there would be any adequate remedy at law. It is true that the time (5 years) for the performance of these duties has not yet arrived, so that there can be no specific performance of the agreement; but the defendants having denied any right in the plaintiffs upon the contract at all, the plaintiffs, if they establish their case, are entitled to a declaration of the liability of the defendants to perform the contract. The consequence of the non-performance of these settlement duties is not only to prevent the plaintiffs from getting a rebate in price, but under the terms of the contract with the Dominion Government might eventuate in the forfeiture of the whole agreement: *Story Eq. Jur.*, secs. 721, 721a, 9th ed.

But there is much more than the pleadings to go upon in the present case. The contract with the Government, the prospectus of the plaintiffs' company, the scrip con-

tract with the defendants, and several articles in newspapers, a petition to the Government and other papers, all bearing more or less on the nature of the questions to be decided at the trial, were before the Master in Chambers, and were used on the hearing of this appeal.

One of the chief, and perhaps the most prominent, grounds of defence, depends upon misrepresentations in the prospectus. Whether there are any, and what, statements in that paper that amount to a representation the falsity of which would afford a defence, is a matter more proper, if not the exclusive duty of the Judge, for the consideration of the Judge than of a jury. The determination also of the fact whether the representations are false or not, depends in part at least upon the construction of the agreement between the plaintiffs and the Dominion Government, and of the Public Lands Act of 1879, and of the nature and effect of a correspondence between the plaintiffs and the Government, which are all matters that can much better be disposed of by a Judge than by a jury.

Another reason for not submitting this case to a jury, one that cannot be overlooked, although these defendants may not, or are not proved to, have been active in it, is that scrip contractors with the plaintiffs, who are in the same position as the defendants and interested as the defendants are in getting rid of their liability on these contracts, have associated together for the purpose of defeating the plaintiffs in attempts to enforce these contracts, and have subscribed, or been assessed for, contributions for that purpose. So far they were perhaps keeping within their right. But beyond this they have taken active steps to influence the public mind by articles in the newspapers and otherwise against the plaintiffs. Three of these articles appeared in the *World* newspaper of the 14th, 15th, and 16th January, 1886, a paper that has an extensive circulation in Toronto at least, and which I have no doubt from the examination of Mr. Yeigh, one of the defence association, were written or inspired by him by direction of or in the interest of that association. These articles are animated by a spirit hostile

to the plaintiffs, and calculated to prejudice them in the prosecution of their actions. In the last of these this paragraph occurs: "Mr. Powell claims that his society is not on the verge of insolvency. Perhaps not, so long as they can bleed delinquent scripholders, and by threats of writs and suits frighten them into paying up. That is their only salvation, and the scripholders' money has been the mainstay of the affair all along." Many other charges are brought against the plaintiffs, their managers and directors, and all calculated to shew them grasping, greedy, and prosecuting the objects of the company with selfish ends. Such statements could not fail to create an impression adverse to the plaintiffs, and prevent them from having a fair and impartial hearing before a jury. It is no answer to this to say that the defendants are not proved to have taken part in these proceedings. If the proceedings have been taken, even by a person wholly disinterested pecuniarily or otherwise in the doings of the plaintiffs, and if the effect will be that the defendants will get the benefit of them, I think it is a case in which the action should be brought before a tribunal that can be the least affected by them.

It may be that all the charges against the plaintiffs are true; that is a matter not material to be considered on this application. My duty is to determine in what way the truth is most likely to be reached.

Assuming, however, that all the grounds of action would have been of common law cognizance, the 45th section of the Judicature Act enacts that the mode of trial shall be as now (then) provided for like cases in the Courts of Queen's Bench and Common Pleas. The mode of trial at that time was regulated by the Common Law Procedure Act. The 252nd section provides for the trial of certain actions that must be tried by a jury unless such trial be waived. The 253rd section enacts that all other actions shall be tried by a Judge unless a jury notice be given. The 254th section is for carrying the last into effect. But by the 255th section, upon application to the Court in

which the action is pending, or to a Judge thereof, by an order made before the trial, or by the direction of the Judge presiding at the trial, the issues may be tried and damages assessed without the intervention of a jury. Under this section a Judge has power in any action that might have been the subject of a common law action to direct it to be tried without a jury. And I do not see anything to prevent him from taking into account as a reason for such direction that by the acts of parties other than the defendants, but of which the defendants may get the benefit, the plaintiffs may be prejudiced by bringing the case before a jury.

But certainly the other grounds mentioned above seem to me amply sufficient to shew that the case can best, indeed, can only properly, be tried by a Judge.

I have not taken notice of another argument used by the plaintiffs, based upon the relation between the defendants Evans and Angus, and raising equitable considerations between them, the one being principal and the other surety, as the other grounds seemed sufficient for the disposal of the appeal. I do not desire this argument, however, to be deemed in my estimation of no weight. In the progress of the trial it might become necessary to adjust these equities, and would thus be another reason for confiding the trial to a Judge.

An appeal was argued before the Divisional Court on the 17th and 18th February, 1887.

Hoyles and A. D. Cameron, for the appeal.

Lount, Q.C., and A. H. Marsh, contra.

The following authorities were referred to: Sec. 45, O. J. A.; *Bank of British North America v. Eddy*, 9 P. R. 468; *Masse v. Masse*, 11 P. R. 81; *Conmee v. Canadian Pacific R. W. Co.*, 12 A. R. 744; *Cardinall v. Cardinall*, 25 Ch. D. 772; *Gardner v. Jay*, 29 Ch. D. 50; *Clarke v. Cookson*, 2 Ch. D. 746; *Bordier v. Burrell*, 5 Ch. D. 512; *Wedderburn v. Pickering*, 13 Ch. D. 769; *Bennett v. Tre-*

gent, 25 C. P. 443; *Humphreys v. Hunter*, 20 C. P. 456; *Fry on Specific Performance*, 2nd ed., pp. 46, 373-377; *Greene v. West Cheshire R. W. Co.*, L. R. 13 Eq. 44; *Re Cozier*, 24 Gr. 537; *Waring v. Warde*, 7 Ves. 332; *Thompson v. Wilkes*, 5 Gr. 594; *Ford v. Proudfoot*, 9 Gr. 482; *Totten v. Douglas*, 15 Gr. 126; *Owston v. Grand Trunk R. W. Co.*, 26 Gr. 93, 28 Gr. 428.

BOYD, C. —This appears to me a proper case in which to exercise the power possessed by the Court of severing the action for the purpose of having that part of it which is preliminary to the other first tried. Here the first and chief cause of action is the right to recover the money demand against the defendants. This was the whole cause of action as the pleadings stood originally, and at the time when the jury notice was given. By amendment thereafter the other claim was introduced, which partakes of an equitable character, and which it is only proper to consider in case the plaintiffs make good their right to recover for the arrears against the defendants. Such a recovery will be an affirmance of the validity of the whole contract, and it will then be in order to consider whether the plaintiffs can enforce specifically that part of it which relates to settlement duties, or rather a declaration that the plaintiffs are entitled to such payment in specie when the proper time comes—that will involve, however, the question, which is one rather of law than of fact, as to whether the company can have the work done specifically by the defendants or must be content with some other remedy. The cases which justify this marshalling of the matters in controversy are *Sheppard v. Gilmore*, 34 W. R. 179; *Irwin v. Sperry*, 11 P. R. 229; *Smith v. Hargrove*, 16 Q. B. D. 183; Rule 256, O.J. A. I am not impressed by the point urged that the public mind is so prejudiced that a fair jury trial cannot be had. A very small part of the public is concerned with the intestine strife raging between corporators and company. The publications in the newspapers must be long ago forgotten by all, except perhaps parties immediately interested, and

any possible danger in the manner of trial may be averted, as in *Salter v. McLeod*, 10 U. C. L. J. (O.S.) 76, by a special jury—if indeed the case is ultimately tried by a jury. But there is a *prima facie* right in the defendants to have a jury as to the main matter of controversy; even if the trial Judge should think fit to dispense with a jury that is no reason why we should now order it to be struck out: *Conmee v. Canadian Pacific R. W. Co.*, 12 A. R. 744.

The result I have indicated will be practically accomplished by restoring the jury notice. The whole matter can then come on for trial, and the Judge at *Nisi Prius* if retaining a jury will leave that part of the case to them which is proper for their disposition, and will deal with the other matters of equity probably without the aid of the jury.

Costs of appeal will be in the cause to the defendants in any event.

FERGUSON, J.—The English rule under which there have been several decisions is :

“The Court or a Judge may in any action at any time, or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others.”—1875, Order 36, Rule 6.

Our Rule on the subject is :

“Subject to the provisions of the Act and of the preceding Rules, the Court or a Judge may, in any action at any time or from time to time, order that different questions of fact arising therein be tried by different modes, or that one or more questions of fact be tried before the others, and may appoint the place or places for such trial or trials, and in all cases may order that one or more issues of fact be tried before any other or others.”—Order 31, Rule 3, Marginal Rule 256.

There is no doubt all the power under our Rule that there was or is under the English Rule. It has been held that the power under the English Rule is a discretionary

power but that the discretion is a judicial one, and there have been appeals from orders made in the exercise of such discretion by a Judge.

The case *Smith v. Hargrove*, 16 Q. B. D. 183, was such an appeal from a Judge in Chambers to the Court. The question of negligence of the defendants, involving probably matters as to perils of the sea, was ordered to be first tried, and after liability of the defendants established then a complicated account. The Court said the first question would have to be decided by a special jury. The other it was thought could be best dealt with by an average stated, &c.

In *Piercy v. Young*, 15 Ch. D. 475, it was held that a defendant who had set up a counter-claim was not entitled to an order for the trial of her claim first, and so take the conduct of the cause away from the plaintiff.

There is also a case where the legitimacy or not of a claimant upon a fund was ordered to be first tried, and then if found in her favour the accounts taken. This was for the saving of costs apparently.

In *Emma Silver Mining Company v. Grant*, 11 Ch. D. 918, the action was against several defendants, involving various issues. The plaintiffs applied for an order for two simple issues to be tried as between themselves and two of the defendants before the rest of the action. The order was made on the plaintiffs undertaking not to seek relief against those two defendants in respect of any cause of action other than that covered by the issues so to be tried, and also discontinuing such portion of the action as the Court should direct. The defendants appealed from this order, and it was affirmed with a slight variation.

The present case is a question of striking out a jury notice given by the defendants. The appeal is from an order made in Chambers reversing an order made by the Master. The plaintiffs claim payment of an amount of money by virtue of certain documents called scrip. The defendant sets up virtually that he was induced to take the scrip and sign the same by the fraud of the plaintiffs.

The plaintiffs, by way of an amendment, further claim specific performance and the doing of certain location or settlement duties upon lands in the North-West Territory, to be selected by him according to the alleged contract. The defendant resists this claim on the same ground, and also upon the ground that the contract, even if it is held to be good and binding upon him, is in its nature and under the circumstances one that the Court will not order specific performance of.

It appears to me that if the question as to the right to recover the money from the defendant were determined, that would settle the question of the alleged fraud, and then if that were settled in the plaintiffs' favour, the matter of the specific performance could be readily dealt with; and if it were settled in defendants' favour it would not be necessary to deal with it at all. I think the first question is fairly one for a jury, and one as to which standing alone the defendant has the *prima facie* right to a trial by jury, and he insists upon his right.

I do not think it has been shewn that this is a case in which, or in respect of which, the public mind is so prejudiced against the plaintiffs, or their claim, that a fair and proper trial by jury cannot be reasonably expected, and besides a special jury may be had.

I think the other and remaining question, if it has to be tried, can be more conveniently tried and determined without the intervention of a jury, and I am of the opinion that this is a proper case for the exercise of the power given by Marginal Rule 256, if the power and discretion can be properly exercised in a case coming up in this way and not upon a motion asking for the exercise of such discretion.

I am further of the opinion that the power and discretion can be exercised in this case, because the power is given to the Court or a Judge to be exercised in any action at any time and from time to time, and it seems to be unrestricted except that it is subject to the provisions of the Act and of the preceding Rules, and in these I do

not perceive anything to prevent the Court from making the order.

The same object will be practically accomplished by restoring the jury notice, and then the Judge at the trial can deal with the subject as he may see fit.

PROUDFOOT, J.—I retain the opinion I have already expressed, that this is not a case proper to be tried by a jury.

The C. L. P. Act, sec. 255, gives power to the Court or to a Judge of the Court in which the action is pending by an order made before the trial to direct the issues to be tried without the intervention of a jury. The same section gives a like power to the Judge presiding at the trial.

When it is made perfectly clear that the issues are such that they cannot be properly tried by a jury it is, in my opinion, not only within the jurisdiction of the Court or a Judge before the trial, but it is their duty to strike out the jury notice. In many cases, where the alleged facts are not verified, as in the *Connree* case, it is probable that the Judge at the trial is the proper officer to apply to. But to say that in every case the application is to be made to him: to say that we have the power but we must not exercise it is to abdicate the function we are required by the Legislature to discharge.

Jury notice restored.

[This decision has been appealed to the Court of Appeal.]

CHICK v. TORONTO ELECTRIC LIGHT CO.

Costs, scale of—Rule 218—Money paid into court with defence.

The plaintiff in an action in the High Court of Justice claimed \$296.14, the balance of an account of \$896 for rent and goods sold and delivered.

The defendants in their statement of defence admitted a liability of \$170.30, but claimed a credit of \$81.14, leaving a balance due of \$89.16, which they brought into court with their defence.

The plaintiff served notice under Rule 218 accepting the amount paid in full of the claim, and proceeded to tax his costs. Upon taxation a question arose as to the scale of costs.

Held, that the provision in Rule 218, that the plaintiff may tax his costs, does not give him costs according to any higher scale than if he had entered judgment for the sum which he received out of court; the costs should therefore be on the County Court scale, as the whole amount of the account was over \$800, and the amount admitted by the defendant was \$170.30.

[March 8, 1887—*Rose, J.*]

THIS was an appeal from Mr. Clark, one of the taxing officers, who ruled that the plaintiff was entitled to costs according to the High Court scale.

The defendant company also, by notice of motion returnable at the same time, asked to have the discretion of the Court exercised in depriving the plaintiff of costs.

The action was brought by the purchaser of the book debts of the Bolt & Iron Company, from the assignee of the company, the plaintiff claiming that the defendant company was liable to the Bolt & Iron Company in the sum of \$296.14, balance of an account for rent and goods sold and delivered, amounting to \$896.

The defendant company, in their statement of defence, admitted a liability of \$170.30, and claimed a credit of \$81.14 for sums paid at the request of the Bolt & Iron Company, thus admitting a balance of \$89.16, which was brought into Court with the statement of defence.

The plaintiff served notice under rule 218, accepting the amount paid in full of the claim.

That rule provides that upon giving such notice, the plaintiff shall be at liberty to tax his costs, and in case of

non-payment within forty-eight hours to sign judgment for his costs so taxed.

Nothing is said in the rule as to the scale, but the taxing officer taxed the costs according to the High Court scale.

Lefroy, for the defendants.

W. T. Allan, for the plaintiff.

ROSE, J.—The practice prior to the Judicature Act, as stated in *Archbold's Practice*, 12th ed., p. 1369, was as follows : “A plaintiff is not entitled to costs without an order for that purpose, if less than £20 in an action of contract, or not more than £5 in an action of tort, is paid into Court, and such sum is taken out in full satisfaction of the plaintiff's claim.” See also 14th ed. of *Archbold*, p. 349.

If the plaintiff's contention be correct, that under rule 218 he is entitled to costs according to the High Court scale, the following anomaly would exist, viz.: a party might issue a writ in the High Court, claiming say \$50 on a promissory note. If no defence be offered and judgment entered, then under rule 511 the plaintiff would get only costs according to the Division Court scale. If, however, the money be paid into Court, then under rule 218 the plaintiff would be entitled to costs according to the High Court scale. This surely cannot be so.

It will be observed that the rule says, “Shall be at liberty * * * to tax his costs,” but says nothing as to the scale.

In *Watson v. Garrett*, 3 P. R. at p. 74, Richards, J., said : “I am not prepared to assent to the proposition, that because the order of reference directs that the costs shall abide the event, the plaintiff, if successful, shall have full costs, no matter how small a sum he may have had awarded to him. I think it means no more than this, that he shall have such costs as under the statute and rules of Court a plaintiff recovering the amount that he recovers by the event is entitled to.”

See also cases referred to in *Ireland v. Pitcher*, 11 P. R. 403, and the case of *Andrews v. London*, decided in the Chancery Division on the 5th instant, (now reported ante p. 44) and the decision of Mr. Justice Armour at Cornwall in the case of *Tobin v. McGillis*.*

In *Hyde v. Beardsley*, 18 Q. B. D. at p. 247, A. L. Smith, J., said: "The costs of the cause and the reference are to abide the event. That means abide the event according to law. If the plaintiff recovers less than £50 he shall not have High Court costs unless the Judge orders them."

In my opinion the provision in rule 218 that the plaintiff may tax his costs, does not give him costs according to any higher scale than if he had entered judgment for such sum, in other words does not fix the scale.

It would seem very unjust that a plaintiff might to a just claim of say \$90 add an unjust or unfounded claim of say \$120, making a claim of over \$200 as on an unsettled account, and that the defendant, who never denied his liability for the lesser sum, could not pay it into Court, denying his liability as to the balance without the risk of the plaintiff accepting the amount actually owing and fixing him with costs according to the High Court scale.

TOBIN V. MCGILLIS.

November 17, 1886. ARMOUR, J.—I see no reason to change the opinion I expressed at the trial, that according to the true construction of the mortgage in question, the defendant had paid into Court sufficient to satisfy the plaintiff's claim, and I so find, and I direct that the plaintiff do forthwith execute a proper discharge of the said mortgage. The rule as to costs before the Judicature Act was, that if money was paid into Court in respect of the whole cause of action, and the plaintiff refused to accept it in satisfaction, and recovered no more at the trial, the defendant was entitled to judgment and his costs of suit: *Harrison's Common Law Procedure Act*, sec. 102; 19 Vic. ch. 43, sec. 122. There is nothing in the Judicature Act to alter this. I think, therefore, that judgment must be entered for the defendant with his full costs of suit. I refer to *Langridge v. Campbell*, 2 Ex. D. 281; *Berdan v. Greenwood*, 3 Ex. D. 251; *Buckton v. Higgs*, 4 Ex. D. 174; *Gretton v. Mees*, 7 Ch. D. 839; *Hawkesley v. Bradshaw*, 5 Q. B. D. 302; *Wheeler v. United Telephone Co.*, 13 Q. B. D. 597; *Goutard v. Carr*, *ib.* 598; *McIlwraith v. Green*, 14 Q. B. D. 766.

It would seem fairer that the action of the parties, the payment by the one and acceptance by the other, should *primâ facie* determine the amount due at the commencement of the action, and that a plaintiff who chooses to make a claim he is unwilling to press, should run the risk of costs. Let him not speculate upon the chances of what the defendant may do, or if he wishes to run the risk, let him do so at his own expense.

If for any reason that may be just the plaintiff is entitled to full costs, let him apply to the Court for an order under rule 428 ; under which rule also the defendant may, if the facts warrant it, apply to deprive the plaintiff of any or all costs. See *MacLennan*, 2nd ed., p. 351, and cases cited in notes to rule 218.

I am asked by the defendants to disallow the costs entirely, because the defendants were always ready and willing to pay the amount claimed, and had offered to do so to the assignee of the Bolt and Iron Company, who had refused to accept such sum in full ; and, that the plaintiff never made any demand before action : citing the case of *Morris v. Burnett*, 65 L. T. J. 176.

The plaintiff's solicitors put in an affidavit, stating that they sent the usual solicitor's letter a week before issuing the writ, and had no reply.

I think this part of the motion fails.

The plaintiff, as I have said, stated in his claim that the whole account amounted to over \$800.

The defendant company in their statement of defence do not deny this statement, possibly in one view admit it.

They also admit a liability of \$170.30, and claim a credit by way of set-off or counter-claim of \$81.14.

I do not see how the plaintiff could safely have brought his action in the Division Court, and think he is entitled to costs according to the County Court scale.

Unless the solicitors can settle the amount between themselves, there must be a reference back to the taxing officer to review his taxation according to such scale.

As the defendants have failed in the one motion and succeeded in the other, there will be no costs of this appeal.

McMAHON ET AL. V. LAVERY.

Jury notice—Legal and equitable issues—C. L. P. Act, secs. 257 and 258.

The plaintiffs sued, as executors of McB., to recover from the defendant, a solicitor, money placed in his hands for investment, and notes and money received by him as solicitor and agent for McB., and prayed that the defendant might be ordered to assign certain securities in his hands. The defendant set up by way of defence a certain agreement, under which he alleged that the plaintiffs were estopped from making their claim. The plaintiffs then amended their statement of claim, setting up fraud in procuring this agreement, and asked that it might be declared void, and be delivered up to be cancelled.

Held, that the case came within secs. 257 and 258 of the C. L. P. Act, and that the legal issues should be tried by a jury, and the equitable issues by a Judge without a jury, unless the Judge at the trial, in the exercise of his discretion, chose to try the whole case without a jury; but that the defendant was not entitled as a matter of right to have the jury notice struck out.

Temperance Colonization Society v. Evans, ante p. 48, followed.

[March 12, 1887—*The Common Pleas Division.*]

THIS was an appeal from an order of Galt, J., affirming an order of John Winchester, Esq., acting Master in Chambers, which order dismissed an application by the defendant to strike out the jury notice.

W. H. P. Clement, for the appeal.

Watson, contra.

ROSE, J.—It is contended that the plaintiffs claim relief that could have formerly only been had in the Court of Chancery, and that therefore the defendant is entitled as a matter of right to have his order granted, under *Pawson v. Merchants Bank*, 11 P. R. 72.

The plaintiffs' claim is for moneys said to have been placed in the defendant's hands by one Dennis McBride, to be invested on mortgage, the defendant being at the time his solicitor,

The plaintiffs sue as executors of the will of McBride.

The claim also includes certain promissory notes and moneys received by the defendant as solicitor and agent of McBride.

As thus stated the action would, prior to the Judicature Act, have been what was known as a purely common law action. The plaintiffs, however, ask to have it ordered that certain securities in the defendant's hands be assigned to the plaintiffs. The defendant sets up by way of defence a certain agreement, under the terms of which the plaintiffs, as he claims, are estopped from making the said claims.

The plaintiffs then amended their statement of claim, setting up fraud in the drawing of the paper writing, and in procuring the plaintiffs to execute the same, and ask that it may be declared void and delivered up to be cancelled.

The claim is also for payment of the moneys alleged to be owing.

There are therefore upon the record claims both legal and equitable, and the case comes within secs. 257 and 258 of the C. L. P. Act, R. S. O. ch. 50; see *MacLennan*, 2nd ed., p. 62; under which the legal issues may be tried by a jury, and the equitable by a Judge without the intervention of the jury, and the equitable issues may also by order be tried by the jury.

The procedure at the trial would be simple. The jury would be asked certain questions, disposing of the facts as to the indebtedness, and as to the fraud, and upon their findings the Judge would enter such judgment as he might think just, in accordance with such findings.

The case comes within the decision of the Chancery Divisional Court on the 5th inst., in the case of *Temperance Colonization Society v. Evans*, ante p. 48, as I understand that decision; and is, I think, in principle governed by *Pawson v. Merchants Bank*, 11 P. R. 72, as it cannot, in any sense, be said to have been formerly within the exclusive jurisdiction of the Court of Chancery.

The appeal fails, and must be dismissed, with costs in the cause to the plaintiffs in any event.

No doubt if the learned Judge at the trial thinks it more convenient to try the case without a jury he will

exercise his discretion, but the defendant is not entitled to the order as a matter of right.

CAMERON, C. J., and GALT, J., concurred.

Appeal dismissed.

DOBIE v. LEMON.

Judgment by default—Setting aside—Security—Disposal of property—Interest.

The plaintiff claimed \$923.13, the balance of an account, and interest thereon, and signed judgment for default of an appearance upon the special indorsement of his writ of summons for \$1,253.

The defendant moved to set aside the judgment, swearing that he had failed to enter an appearance owing to a misapprehension, denying positively that he owed the plaintiff anything, and alleging that he at one time owed him \$250, but that it had been satisfied by the plaintiff taking one A. as his debtor instead of the defendant, and further, that if the debt had not been satisfied by A., it was barred by the Statute of Limitations. No affidavit was filed on behalf of the plaintiff verifying the debt, and the arrangement as to substituting A. was not denied. A local Judge set aside the judgment, but only on the terms that the defendant should give security for or pay into court the sum of \$250.

Held, that if upon an application by the plaintiff, under Rule 80 or Rule 324, for leave to enter judgment, such a defence had been sworn to, and such circumstances had appeared, the application would not have been granted, and payment into Court or security would not have been exacted from the defendant as a condition of his being allowed to defend; there is no substantial difference between the case where a party seeks the right to defend before judgment signed, and the case where the judgment has been signed on account of a slip or misapprehension, and the defendant makes out a case giving him the right to defend; and therefore terms should not have been imposed upon the defendant. The disposal by the defendant of his property liable to execution since the service of the writ of summons upon him was not a matter to disentitle him to relief that otherwise could not properly have been denied him.

Runnacles v. Mesquita, 1 Q. B. D. 418, followed.

Semble, if the defendant's statements were true, the plaintiff would not have been entitled to interest on the amount of his claim, and the judgment would have been irregular.

[March 12, 1887—*The Common Pleas Division*.]

APPEAL by the defendant from an order of Armour, J. in Chambers.

The facts appear in the judgment.

C. J. Holman, for the defendant.

Aylesworth, for the plaintiff.

CAMERON, C. J.—The defendant has appealed from an order of Armour, J., in Chambers, made on the 26th day of November, 1886, dismissing an appeal from an order made by Samuel J. Lane, Esquire, local Judge of the High Court of Justice at Owen Sound in and for the county of Grey, on the 17th day of November, 1886, setting aside a judgment signed by the plaintiff against the defendant, for want of appearance, upon his giving security to the satisfaction of the local registrar of this Court at Owen Sound to the amount of \$250, or paying into Court, in lieu thereof, the sum of \$250 to abide the result of the action, and upon his paying to the plaintiff the costs necessarily incurred by him subsequently to the time when the defendant ought to have entered an appearance. The plaintiff sues as the assignee of the estate of James Sutherland, and the summons by which the action was commenced was endorsed as follows: "The plaintiff's claim is for the sum of \$923.13, and for interest thereon since the 31st day of October, A. D. 1880.

The following are the particulars:

To cash supplied from June 1st, 1879, to June 30th, 1880, inclusive.....	\$9512 24
By credit—Grain supplied by defendant to James Sutherland, from 1st June, 1879, to 31st October, 1880, inclusive.....	8589 11
	<hr/>
	\$ 923 13

and interest thereon at 6 per cent. from the said 31st day of October, 1880."

The summons was issued on 17th day of September, 1886, and served on the 9th day of October following, and on the 19th day of October judgment was signed for \$1253 and \$17.71 costs.

On the 6th day of November, 1886, the defendant obtained from the said local Judge a summons calling on the plaintiff to shew cause on the 10th November, 1886, why the judgment should not be set aside, and the defendant admitted to defend the action upon the grounds: (1) The copy of the writ of summons served upon the defendant does not shew the Division to which the action belongs, nor the officer by whom it was issued, nor is it a copy of the writ of summons in the action, nor does it purport to be signed by any officer of the Court. (2) The plaintiff's claim is as assignee of the estate of James Sutherland, but the writ of summons contains no endorsement shewing that he sues in such representative capacity. (3) There is no such special endorsement upon the writ of summons of the particulars of the plaintiff's claim as entitles the plaintiff to sign final judgment for debt and costs in default of appearance. (4) The materials upon which the said judgment is signed are further defective in that the affidavit of service states the writ of summons herein was issued out of the office of the clerk of this Court, whereas in fact it was issued out of the office of the local registrar of this honorable Court at Owen Sound; and in that the affidavit of non-appearance states simply that no appearance was at the time of signing judgment entered in the office of the clerk of this Court, whereas there should have been filed (which was not done) an affidavit that no appearance was then entered for the defendant in the office of the local registrar at Owen Sound. (5) The defendant has a good defence upon the merits to this action. And upon other grounds disclosed in the affidavits and papers filed upon signing the said judgment, and in the affidavits of the defendant and Duncan Morrison, now filed, all of which materials the defendant proposes to use on this application.

In the defendant's affidavit in support of the summons, he swore that upon being served with the writ of summons he called upon the plaintiff and informed him that he owed said James Sutherland nothing; that the claim had been long settled; that the plaintiff informed him that

he could do nothing and knew nothing about it ; that he was simply acting for the Merchants Bank, that the manager of the bank, Mr. McIntosh, was very ill, and on that account defendant could not see him ; but it was, as he, defendant, then understood, agreed between the plaintiff and him that he, defendant, should go and see Mr. Sutherland, that he did see Mr. Sutherland, who stated that he had not time to go into the matter but promised to do so soon, and said there would be nothing more done about it until they went through the accounts together and saw how the matter stood ; that relying on this he entered no appearance, and the next he heard of the matter was a seizure of his goods by the sheriff, under execution issued upon the judgment ; that he owes neither the plaintiff nor the said James Sutherland anything ; that his original indebtedness to James Sutherland did not amount to more than \$240, and this was paid by Mr. Sutherland agreeing to accept in lieu of his claim therefor one Alexander Ainslie, who was then storing grain for Sutherland at Leith, and who agreed with Mr. Sutherland to pay the same, and he, defendant, had been informed by Ainslie and believed that he did so pay the same ; and the defendant claimed, even if Ainslie had not paid the same, all claims of the said Sutherland had been barred by the Statute of Limitations, and he relied also upon that statute as a defence.

Duncan Morrison, one of the firm of Creasor & Morrison, defendant's solicitors, by affidavit verified the proceedings on which judgment was signed, and that the defendant had a good defence to the action on the merits.

In answer to the application before the local Judge the plaintiff filed affidavits. The plaintiff swore that at the time the defendant called on him, as stated in his affidavit, defendant said he would see Mr. Sutherland, and he, plaintiff, then told him it would be of no use for him to see Mr. Sutherland ; that the only one he could make any arrangement with was Mr. McIntosh, the manager of the Merchants' Bank at Owen Sound ; that he, plaintiff, was not

then aware that Mr. McIntosh was ill. The defendant asked him what he had better do, and he, plaintiff, told him he should enter an appearance at once; that he would have to defend the action. He then asked if he, plaintiff, could not enter an appearance for him? He told him he would have to go to a solicitor, and recommended one, and plaintiff believed the defendant had gone to a solicitor to enter an appearance for him. That he, plaintiff, gave defendant no reason to understand, nor did he say anything from which he could infer that he could or was to make any arrangement with Mr. Sutherland. That he distinctly told him that Mr. Sutherland could do nothing in the matter, and any arrangement he made must be made with Mr. McIntosh.

James Sutherland, plaintiff's assignor, made affidavit that after the summons had been served and before judgment he met defendant coming out of the office of his solicitors, Messrs. Creasor & Morrison, and defendant said he had been sued and did not owe the amount sued for; and stated further the balance owing by him did not exceed \$250. The defendant admitted then that he owed \$250, but contended that was all he did owe. That after the sheriff made a seizure defendant contended the amount was too large, that he only owed the estate about \$250; and then defendant said if he, Sutherland, had gone to him he would have paid him from \$50 to \$100, and gave him to understand that sum would have been for his own use had he gone to him for a settlement instead of allowing it to be sued. That he offered the defendant any assistance in his power to arrive at a settlement if the amount sued for was too much, but neither told the defendant nor gave him to understand there would be nothing more done about it till the accounts were gone into. That before making the assignment to the plaintiff he frequently spoke to defendant about the amount, and he never made any objection, but always promised if he were able he would pay it.

John Milbourn Kilbourn, one of the plaintiff's solicitors, swore that he had examined the defendant as a judgment debtor in the action touching the disposition made by him of his property on the 4th day of November; and defendant then stated in effect, on oath, that since the issue of the writ of summons he had sold and conveyed to his wife's father, one John Kennedy, a farmer residing in the township of Arran, the only parcel of real estate owned by him, for the sum of \$600; that he had received the full amount of the purchase money therefor; that he had handed the same to his wife, and did not know what amount thereof his said wife still had. The defendant also claimed to have recently received the sum of \$240, in cash and note, as purchase money of a horse, buggy, and harness sold by him, but still remaining in his possession, and got said note cashed, but he had none of the money remaining. And the deponent verily believed, if the judgment should be set aside without payment into Court of the amount being made or security given, the plaintiff's judgment or debt will be lost to him.

William Thomas Moore, deputy sheriff, made affidavit that the defendant's goods were seized under the execution in this cause on the 30th day of October; and after that seizure the defendant told him that when defendant quit dealing with Sutherland he only owed him about \$280, and that he and said Sutherland made an arrangement whereby Sutherland was to give him credit on account of this indebtedness of \$280 for any sum that he Sutherland might become indebted to one Alexander Ainslie in respect of storage of grain for said Sutherland; and that shortly after Sutherland made other arrangements with Messrs. Ross Brothers, for buying and storing grain, and he supposed Ainslie had not paid very much on his, defendant's, account. The defendant then offered to give security for the forthcoming of the stuff seized, if the plaintiff would refer to the books and give him credit for the amount of Ainslie's storage account, on the said balance of \$280, and the defendant stated he would pay the balance

remaining. That the only chattels outside of the hotel furniture in defendant's possession are a horse and buggy, which were first claimed by the defendant's wife, and subsequently by one De LaMatter, as purchased from the defendant. And if the claim for rent and the claim of the defendant's wife or De LaMatter to said horse, buggy, and harness are substantial, there will be little or nothing left to satisfy the plaintiff's execution.

The defendant on the 20th day of November, 1886, made a further affidavit, in which he stated he had heard read copies of the affidavits of James Sutherland, William Thomas Moore, and the plaintiff, and he swore that he understood from both the plaintiff and James Sutherland that nothing further would be done in the action until the defendant and Sutherland went into the accounts. And, in consequence, he did not consult any solicitor about the action until after the sheriff had seized; and it is entirely incorrect, as stated in the affidavit of Sutherland, that he, Sutherland, saw defendant, after the summons was issued and before judgment, coming out of the office of Creasor & Morrison, for he was not in their office during that time, and he did not enter their office or consult them until after the sheriff had seized; that although he did state to different persons that his indebtedness to Sutherland was not originally more than about \$250, he never admitted to any one that he was still indebted to him or his assignee in that or any other amount; but, on the contrary, always claimed and believed that he could prove that the said Sutherland agreed to accept Alexander Ainslie as his debtor for the amount he, defendant, then owed Sutherland, and that the said Alexander Ainslie paid such amount. And, moreover, he, defendant, claimed that the demand sued on was barred by the Statute of Limitations. On the 23rd of November the defendant made a further affidavit, in which he stated that it had been called to his recollection that on the 18th day of October last he did call at Creasor & Morrison's office in reference to a letter received from them, claiming on behalf of Messrs. Ross Brothers a small amount for

goods furnished to the defendant, on which occasion he only saw a clerk, Arthur Spence, and made no reference to, and had no conversation about this action.

Duncan Morrison, of the firm of defendant's solicitors, also made a further affidavit, in which he swore that the defendant did not consult his firm in regard to this action until Monday the 1st day of November, when he understood from him his goods had been seized on the Saturday preceding : and that owing to the absence from town of both the local Judges of the county of Grey he could not after getting the materials therefor ready obtain a summons to set aside said judgment until the following Saturday, the 6th day of November.

As was pointed out by Mr. Holman in the argument, there is no affidavit filed on behalf of the plaintiff verifying the debt, or claim, and the plaintiff's assignor, Sutherland has not denied that there was the arrangement made between him and the defendant that the defendant has sworn to, that he Sutherland was to take Ainslie for the balance that was then due to him. The transaction is not sufficiently stated in the affidavits for the Court to form an opinion as to whether the agreement itself, without Ainslie having paid Sutherland the balance, amounts to a satisfaction as against the plaintiff of such balance. But the defendant in positive terms denies that he owes the plaintiff or Sutherland anything, and also alleges that he claims, even if the debt has not been satisfied by Ainslie, it is barred by the Statute of Limitations. Under these circumstances, and the matters brought before the Court on the affidavits, I think there can be no reasonable doubt that neither under rule 80 nor under rule 324 could the plaintiff have obtained judgment for any sum whatever without trial : see *Hughson v. Gordon*, 10 P. R. 565, and *Ontario Bank v. Burke*, 10 P. R. 561, and the authorities there referred to. There can be no doubt either, upon the affidavits on both sides, that the defendant has consistently denied his liability to any greater amount under any circumstances than \$250 ; or, if the deputy sheriff is right in

his recollection of what the defendant said to him, \$280 ; but he always stated, too, that that amount had been satisfied by the alleged arrangement between him and Sutherland, and not denied by Sutherland to have been made, except by implication, when Sutherland swears that the defendant frequently spoke of his indebtedness and said he would pay the amount when able. What amount he thus promised to pay Sutherland does not state. Then the defendant further contended that the plaintiff's claim was barred by the Statute of Limitations, and this is a defence he must have been allowed to set up if made apparent, though he in his defence, in the first instance, might have omitted to set it up: *Seaton v. Fenwick*, 7 P. R. 146 ; *Maddocks v. Holmes*, 1 B. & P. 228 ; *McIntyre v. Canada Co.*, 18 Gr. 367. Then looking at the claim as presented by the writ of summons, it was in fact barred unless the plaintiff proved that the payments he has given credit for were, or some of them were, made on or after the 17th day of September, 1880. The statement of claim shews the money was advanced to the defendant on the 30th June, 1880, and nothing more appearing, *prima facie* that sum became repayable on request, that is in law, at once, and so the statute commenced to run on and from the 30th June, 1880, and there was a bar of the action by operation of the statute when the writ of summons was issued ; the burden of removing which rested upon the plaintiff. The defendant may be in error in alleging that it was understood between him and the plaintiff, and between him and Sutherland, that nothing further would be done until he and Sutherland had gone into the accounts ; but that certainly would have been a most reasonable arrangement to make. In the nature of things the plaintiff would know nothing of the matter except through information derived from Sutherland or his books, and the latter, without verification, would avail nothing in the way of proof. It may be quite true, as the plaintiff said, that no arrangement could be made, if he referred to arranging the terms of settlement of any balance that might be found due, without the approval

or consent of Mr. McIntosh, the manager of the Merchants Bank, who was I presume Sutherland's principal creditor. But Mr. McIntosh was as ignorant, presumably, of the true position of the claim against the defendant as the plaintiff, and had to rely on Sutherland to establish the claim. Then nothing would be more reasonable than that Sutherland should go over the accounts with the defendant and ascertain the true balance, if any, against the defendant. The defendant's story is then exceedingly probable, if invented. The plaintiff knew of the defendant's contention, and even recommended to him a solicitor to act in his defence, and therefore had no reason to think a defence would not be made. There can be no question then that the learned local Judge was right in ordering the judgment to be set aside, and the only question is, which is the crucial one and the only one relied on in the argument of the appeal, was he right in imposing upon the defendant, as a term of that proper relief, the burden of paying into Court, or finding security for the payment of \$250? That is, was it just to enable the defendant to defend a claim he altogether disputed, amounting to \$1003, to require him to pay or secure \$250, which he admitted at one time he was liable for, but contended on two grounds he was no longer liable for?—that is to say, on the meritorious as well as legal ground of payment or satisfaction; and secondly on the solely legal ground that the claim was barred by the Statute of Limitations? To me it seems the defendant has presented a *prima facie* case of defence to the claim for the \$250, as he did to the rest of the claim; and it would be quite as just to require him to give security for the whole claim as for the portion. It appears to me that the language of Cockburn, C. J., in *Runnacles v. Mesquita*, 1 Q. B. D. at p. 418, is very applicable to the present case, though there the order appealed from was made on an application for leave to sign judgment under the English rule equivalent to rule 80 of our Judicature Act:—"We are agreed that the order of my brother Denman, in making it a condition to the defendant being let in to defend that

he should pay money into Court, was going too far. The Court is always very unwilling to interfere with any matter which is in the discretion of a Judge at Chambers. But this is a new power, and it is a discretion which must be exercised most scrupulously. This is the commencement of a new system, and of a practice, hitherto only applicable to bills of exchange, superseding the ordinary forms of law where the defendant's liability has to be made out by evidence. And I think we must not hesitate to establish a precedent that, when the defendant goes beyond the mere form of stating that he has a good defence, and states what his defence is, and gives reason for thinking his defence is substantial and will be sustained in evidence, the defendant ought not to be compelled to pay money into Court as a condition to his being allowed to come in and defend the action. In the present case the defendant does more than state he has a good defence: he makes affidavit that the contract was for a much less sum than what he has already paid the plaintiff; that the work is ill done, and he has paid already more than it is worth; and he is naturally desirous to submit the matter to a jury or a competent tribunal such as an arbitrator, and I think he ought to have this opportunity without being compelled to pay money into Court. The order, therefore, of the Master, which my brother Denman has affirmed, was, I think an order not within what may be called the proper exercise of the discretion of a Judge."

There seems to me no substantial difference between the case where a party seeks the right to defend an action before judgment signed, and the case where the judgment has been signed on account of a slip or misapprehension, and the defendant makes out a case giving him the right to defend. In one aspect the burden of shewing a *primâ facie* right is changed. Before judgment the plaintiff is bound to make out a case entitling him to judgment. After judgment it is for the defendant to shew *primâ facie*, he has a reasonable ground of defence. But when that ground is established the defend-

ant should be in no worse position than he would have been in if he had not for some excusable cause neglected to appear, the plaintiff not being placed in a worse position through that neglect than he otherwise would have held. In this case there is nothing to shew that by letting the defendant in to defend, the plaintiff is prejudiced in any way that he would not have been had the defendant appeared in the ordinary course. It is to be observed that the plaintiff has signed judgment for interest amounting to \$329.87, and there is nothing in the statement of claim to shew as matter of law the plaintiff is entitled to interest; the allowance, or disallowance of that part of the claim being matter for the discretion of the jury or the Court. It is true that entering no defence admitted the claim for interest, as well as the principal sum on which the interest was calculated; but if we assumed the defendant's case as presented in the affidavits filed was correct, we might resort to the course indicated by Chief Baron Pollock in *Rodway v. Lucas*, 10 Ex. 667, as the proper one to be pursued, and set aside the plaintiff's judgment with costs. The learned Chief Baron there said (at p. 673:) "In the case of *Rodway v. Lucas*, which was argued before us yesterday, and in which we decided that the 25th section of the Common Law Procedure Act, 1852, authorized interest to be claimed by the special endorsement on the writ; we wish that it should be distinctly understood by the profession, that in all cases, except bills of exchange and promissory notes, (as to which it is the usual practice of the Court to allow interest as a matter of course when the jury give a verdict for the plaintiff), if we find that any party not entitled to interest under an express or implied contract shall nevertheless claim it by a special endorsement on the writ, in order to gain an improper advantage, and in default of appearance sign judgment for a larger sum than he is really entitled to, we will not only set aside such judgment, but visit the attorney with the consequences of his abuse of the law, by making him pay the costs."

We have not been furnished with the reasons of either the learned local Judge or of my learned brother Armour, for the decision arrived at by them in imposing the onerous terms of the order, in giving the plaintiff the relief to which they and we think he was entitled. Probably the alleged disposition made by the defendant of his property may have influenced them in so doing ; but whatever may have been the defendant's reason for disposing of his property, he could have made such disposition of it if he had appeared to the action and defended it, as he had a perfect right to do; and in my judgment we have no right, on the material before us at present, to decide that that disposition was improper, or a matter to disentitle him to a relief that otherwise could not have been properly denied him. I am therefore of opinion that the defendant's appeal must be allowed, and that the judgment signed by the plaintiff must be set aside with costs, to be costs in the cause to the plaintiff in any event of the action, and that the defendant be allowed the costs of appeals to the Judge in Chambers and to this Court, to be taxed as costs in the cause to him in any event of the action. I have not referred to any of the special grounds stated in the summons to set aside the judgment, as they were not pressed on the argument or our opinion asked thereon, and in the view I have taken it is not necessary to consider them.

GALT and ROSE, JJ., concurred.

Appeal allowed.

SCOTT V. TOWN OF LISTOWEL.

LIVINGSTON V. TOWN OF LISTOWEL.

Assessment—Appeal—Service of notice—Time—R.S. O. ch. 180, secs. 56, 59.

R. S. O. ch. 180, sec. 59, regulating appeals to the county Judge from the Court of Revision as to the assessment of property, provides (sub-sec. 2) that the person appealing shall serve upon the clerk of the municipality within five days after the date limited by the Act for closing the Court of Revision a written notice of his intention to appeal : (sub sec. 3) that the judge shall notify the clerk of the day he appoints for hearing appeals ; and (sub-sec. 4) that the clerk shall thereupon give notice to all the parties appealed against. Sec. 56, sub-sec. 19, provides that all the duties of the Court of Revision shall be completed, and the rolls finally revised, before the 1st day of July in each year.

The Court of Revision heard the appeals in question on the 10th June, 1886, and rendered judgment on the following day. Notices of appeal dated the 15th June, 1886, were served upon the clerk on the 19th; the Court of Revision sat until the 5th July; on the 15th July the clerk notified the judge that notice had been given of these appeals, and on the 26th July the judge notified the clerk of the day that he had appointed for hearing the appeals, and the clerk notified the parties.

Held, that the limitation in sec. 59, sub-sec. 2, should be construed to mean that notice of appeal should not be served after the expiration of five days from the closing of the Court of Revision ; and also that the service in this case was within the five days, as the notices were in the hands of the clerk during the five days, and were acted upon by him ; and further, that service prior to the expiry of the five days was good service.

[February 25, 1887.—*Rose, J.*]

THIS was a motion for an order for a writ of mandamus directed to his Honor Daniel Hone Lizars, the Judge of the County Court of the county of Perth, directing him to hear certain appeals to him from the Court of Revision for the town of Listowel.

The facts appear in the judgment.

Shepley, for the motion.

W. H. P. Clement, contra.

ROSE, J.—The appeals were dismissed on the ground that notice had not been given as provided by R. S. O. ch. 180, sec. 59, sub-sec. 2, which provides that “The person appealing shall * * serve upon the clerk of the municipality * * within five days after the date herein

limited for closing the Court of Revision, a written notice of his intention to appeal to the County Judge * *". Sub-sec. 3: "The Judge shall notify the clerk of the day he appoints for hearing appeals." Sub-sec. 4: "The clerk shall thereupon give notice to all the parties appealed against * *".

The Court of Revision heard the appeals in question on the 10th of June, 1886, and judgment was rendered on the 11th.

Notices of appeal, dated the 15th June, 1886, were served upon the clerk on the 19th.

The Court of Revision sat until the 5th of July, although by sub-sec. 19 of sec. 56 the business should have been finished by the 1st of July.

On the 15th of July the clerk notified the Judge of these appeals, being the only appeals of which notice had been given.

On the 16th the Judge notified the clerk that he appointed the 23rd of July for hearing the appeals.

The parties were duly notified, and by arrangement the hearing was from time to time enlarged until the 3rd of December, when upon the opening of the matter Mr. Gearing, who appeared for the municipality, objected "that the notices of appeal have been given too soon, the Court of Revision not closing until the 5th of July, 1886, and that there has been no notice of appeal from the decision of the Court of Revision, and no appeal can be heard—the notice should have been given within five days from the closing of the Court."

Mr. Maybee, who appeared for the appellants, urged "that the notice having been in the hands of the clerk during these five days, it is sufficient if given before the 5th July; that appeals having been received and sent to the County Judge, and application for Court made, and several enlargements for hearing made, respondents are now estopped from objecting to the notice."

The learned Judge gave effect to the objection in the following terms: "On reading the several sections of the

statute, and some of the cases cited in *Harrison's Municipal Manual*, p. 670, and the decision of Cameron, J., in *Re Ronald and Brussels*, 9 P. R. 232, I think the appellants not having given the proper notice required within the time limited by sec. 59, sub-sec. 2, I have no power to hear the appeals. "The attendance of parties and the enlargement of the hearing from time to time is, in my opinion, no waiver of the respondents' right to make the objection now to my hearing the appeals. Appeals will be dismissed, with costs, as provided by the statute."

The motion was heard before me on the 17th of December, but I have been unable to consider the matter until now. This I regret, as I am informed that the learned Judge resigned his office on the 1st of January, and the order probably cannot go as asked ; but on this, if necessary, I will hear counsel.

Subject to such question, I have considered the point raised for my decision.

On the argument the objection was rested on the notice having been served prior to the 1st of July. I did not note that any point was made of the Court sitting up to the 5th of July, and in the view I take of the matter it is not important.

It is, of course, clear that literally the service was not made within five days after the 1st of July, if the possession by the clerk of the notices during those five days, and the acting on them subsequently, did not amount to service.

It seems to me, what was intended was to limit the time after which notice was not to be served.

A limited time is given to the Court of Revision within which to do its work, and the Judge is, by the 7th sub-sec. of sec. 59, required to determine the appeals before the 1st of August, and in the same spirit, I think, one may read the limitation in sub-sec. 2 as providing that notice shall not be served after the expiration of the five days. I see no good reason for limiting the time prior to which notice shall not be given, and I am aware that in practice no such limit was regarded by many, at least, of the profession.

I am also of the opinion that in accordance with the spirit of the decision in the matter of *The Westbury upon-Severn Union*, 4 E. & B. 314, the service may be held to have been made within the five days, as the notices were in the hands of the clerk during the five days, and were acted upon by him.

In that case it was held that where it was provided that the last day for the performance of an act falling on Sunday, the act should be performed on the next day following; nomination papers left with the clerk on Sunday were to be considered as left on the Monday.

It was urged that the clerk was, by law, required to mark the day on which he received the notice. To this Wightman, J., said (p. 321): "Why may he not mark Monday?" and again, in reply to counsel on the same objection: "Suppose he finds the notice in his box on Monday?" Erle, J.: "The notice may be treated as delivered on the Monday, and may be marked as received simultaneously with those sent on Monday."

In *Godsell v. Innous*, 17 C. B. 295, Jervis, C.J., suggested during the argument (p. 298): "Suppose the notice were served personally upon the overseers on the 28th, and they choose to treat it as good service, and act upon it, would not that do?" To which counsel answered: "It is submitted that it would not: the overseers have no right to waive the performance of a condition required by the statute."

The learned Chief Justice does not seem to have been convinced, as he kept the question open in his judgment, saying it was unnecessary to consider whether it was competent to the overseers to waive an objection to the due service of a notice. As to such a question see *Re Ronald and Brussels*, 9 P. R. 232.

In my opinion, the clerk having in his hands the notices during the five days, and acting upon them, it may fairly be held that he was served with them within the five days; and I further hold that service prior to the expiry of such five days was good service.

I do not think the decision in *Re Ronald and Brussels supra*, militates against the appellants' contention.

The result is, that the notices were, in my opinion, duly given, and the appeals should have been heard.

Whether the resignation of the learned Judge will prevent the appeals being heard must be considered.

I think the respondents must, in any event, pay the costs of this motion.

MACGREGOR V. McDONALD.

Discovery—Affidavit of documents—Evidence on motion for better affidavit—Inspection of documents—Rule 234, O. J. A.

The plaintiff sought to compel the defendant F. McD. to file a better affidavit of documents, and relied upon the affidavit of documents of a co-defendant D. M. McD., and also upon an affidavit of F. McD., filed upon an interlocutory motion in the action, as shewing that she had in her possession a power of attorney and statements of account which were not set out or in any way alluded to in her affidavit of documents, where-in she stated that the documents set out were the only ones in her possession relating to the action. In the affidavit on the interlocutory motion F. McD. admitted that she had received the power of attorney and statements of account in question from D. M. McD., but not that she had them at the time of making her affidavit of documents.

Held, reversing the order of Wilson, C. J., in Chambers, that the affidavit of D. M. McD. could not be received to contradict the affidavit of documents of F. McD., and that her admissions relied upon were not sufficiently explicit, for it was not to be inferred in the face of her affidavit of documents that at the time of making it she still had the documents which were at one time received by her; and,

Per ROSE, J., upon a subsequent motion, the Court having refused to order a better affidavit of documents, an application under Rule 234, made upon the same material, for inspection of the documents in question on the former application, could not succeed.

[June 26, 1886.—*The Common Pleas Division.*]

[March 1, 1887.—*Rose, J.*]

An appeal by the defendant Frances McDonald from an order of Wilson, C. J., affirming an order of the Master in Chambers directing the defendant Frances McDonald to file a further and better affidavit on production.

S. H. Blake, Q. C., and H. Cassels, for the appeal.

MacGregor, contra.

ROSE, J.—The order appealed from directs the appellant to set out :

1. Certain statements of account of the dealings of the defendant D. M. McDonald with the estate, rendered to her since the testator's death.

2. The documents referred to in D. M. McDonald's affidavit on production of the 25th of February, as being in his possession as her solicitor.

3. Any further and other documents which may be in her possession or power, shewing the dealings of D. M. McDonald with the estate since the testator's death.

The affidavit on production does not refer to any of these documents, and states that except those mentioned in her affidavit she has not any documents in her possession, custody, or power, or in the possession, custody, or power of her solicitor, or agent, or any other person or persons. The clause is in the usual form.

The learned Chief Justice states the rule of law shewing that such affidavit is conclusive against the plaintiff unless it can be shewn from the affidavit or documents therein referred to, or from the pleadings, that other documents exist; citing *Jones v. Monte Video Gas Co.*, 5 Q. B. D. 556.

To this may possibly be added admissions by the party making the affidavit, on examination before the Master or otherwise upon oath. See *Moxley v. Canada Atlantic R. W. Co.*, 10 P. R. 553, and 11 P. R. 39.

It clearly cannot be shewn by a contentious affidavit.

The learned Chief Justice adds, "That question is not before me because Frances McDonald admits she has the document required."

The material upon which the motion was supported as set forth in the notice was :

1. The affidavit of Robt. Mervyn Pillsworth.
2. The exhibits therein referred to.
3. The pleadings.
4. The other proceedings in this action.

Referring to Pillsworth's affidavit we may add, as embraced under No. 2.

5. Affidavit on production of Frances McDonald.

6. Affidavit on production of D. M. McDonald.

7. Affidavit of Frances McDonald filed on motion for a speedy trial.

I do not understand what No. 4 referred to and No. 6 could not, in my opinion, be used as against Frances McDonald.

The admissions must then appear in No. 3, 5, or 7.

The pleadings contain no admissions by her nor are any found in the affidavit on production, as I have pointed out

In clause 14 of her affidavit on motion for speedy trial, she admits having received, returned from her son D. M. McDonald, the power of attorney previously given by her to him, but she does not admit having it at the time of making her affidavit on production, and if that affidavit is true she could not have had it. To find her affidavit on production false, we must have a clear admission—explicit in its terms. The language relied on is, "My said son, of his own mere motion, subsequently returned the same to me."

In clause 15, she says: "* . *" and as to all moneys which he has received for me he has given me the fullest statements and accounts, and rendered the same as I required them."

While it is improbable that such statements would be destroyed and probable that they would be in her possession, I cannot, in face of her express denial, say that they were in her possession, power, or control, at the time of making her affidavit.

If she is examined upon her affidavit it is to be hoped the explanation will be satisfactory.

It is not my duty to reconcile the apparent conflict between the affidavit of the son and mother, because upon this motion I must not look at the affidavit of the son—it being no more receivable than any other contentious affidavit.

Having had it before me on the other appeals, I cannot entirely dismiss it from my mind, and can only hope that the defendant Frances McDonald has not by inadvertence or otherwise been led to make inaccurate statements.

The plaintiff may examine her, and may read to us at our next sittings her examination on the question of costs, or the costs may be reserved until the hearing.

The appeal must be allowed; costs reserved until the next sittings of the Court, and if not then disposed of, to be disposed of at the trial.

Since writing the above I have noted the decision of the Queen's Bench Division in *Norton & Co. v. Lamport, Holt, & Co.*, of the 13th May last, reported in the Times Law Reports of the 26th May. (Vol. 2, p. 630.)

CAMERON, C. J., and GALT, J., concurred.

Appeal allowed.

A motion was made on behalf of the plaintiff in the month of February, 1887, under rule 234, for an order allowing the plaintiff to inspect the documents in question on the former application.

The Master in Chambers made the order asked, and the defendant Frances McDonald appealed to a Judge in Chambers.

C. J. Holman, for the appeal.

MacGregor, contra.

ROSE, J.—This was an appeal by the defendant Frances McDonald from an order of the Master in Chambers directing her to produce for inspection certain statements of account, and a power of attorney referred to in her affidavit filed on a motion for injunction herein, and being the same affidavit as is referred to in the judgment of this Court delivered on the 26th June last, as “No. 7, affidavit of Frances McDonald, filed on motion for a speedy trial.”

The application is under marginal rule 234, which rule clearly presupposes that the documents are in the possession or power of the defendant.

As pointed out in our former judgment, consistently with the truth of the defendant's affidavit on production, she could not at that time have had the possession of, or power over the documents in question. And her affidavit referring to them only shewed that at a prior time they had been in her possession.

We allowed the appeal on the ground that there was no evidence before the Court which we could consider, that would shew that the documents referred to were then in the possession, power, or control of the defendant Frances McDonald, and that therefore we could not order a further and better affidavit.

No fresh material has been filed shewing that the documents have since come into her possession or power.

The effect of this application is that, whereas the Court on the 16th of June declared there was before it no evidence to shew that the documents were then in the possession or power of the defendant Frances McDonald, yet it is on the same material now asked to say that there is evidence that she has them in her possession or power. This, of course, we cannot do.

Would the plaintiff have thought it practicable immediately upon the delivery of the prior judgment to have obtained from the Court the order in question? and if not, mere lapse of time cannot serve to strengthen her position.

The plaintiff has quite failed to apprehend the force and effect of the judgment of this Court of June last, or she would not have moved for the order in question. The appeal must be allowed, with costs in the cause to the defendant Frances McDonald, in any event of the cause.

BETTS V. GRAND TRUNK RAILWAY COMPANY.

Discovery—Production of documents—Railway accident—Report and evidence on investigation.

The plaintiff in an action for damages for injuries sustained in a railway accident, sought to compel the defendants to produce a certain report of an investigation held by the defendants immediately after the accident, and the notes of evidence taken at the investigation. These documents, according to the evidence of H., an officer of the defendants, who was examined for discovery in the action, were not obtained for the solicitor of the defendants, nor for the purpose of being laid before him for advice, nor in view of any impending or threatened litigation, nor after litigation commenced; but "for the purpose of the management of the line; for our own purposes; it was not intended for a purpose of this kind" (*i. e.*, for use in legal proceedings). In answer to the question whether the defendants' solicitor was present at the investigation, H. said, "No; it would be entirely between the officers of the company." The affidavit of the solicitor stated that the information was obtained that he might advise the defendants as to their liability for damages arising from the accident, and that it had been used for that purpose and no other. The defendants' affidavit of documents did not claim privilege for these documents, but denied the possession of any documents relating to the matters in question; but it was admitted that the affidavit of documents had been prepared under misapprehension of the facts, and that these documents were in the possession of the defendants.

Held, that the Court need not under these circumstances consider whether the examination of H. could be received to contradict the affidavit of documents, but should look at the matter as if the documents had been set out and privilege claimed for them; and that upon the statements of H. and the solicitor the documents were not privileged and should be produced.

Wheeler v. Le Marchant, 17 Ch. D. 675, and *Westinghouse v. Midland R. W. Co.*, 48 L. T. Rep. N. S. 462, followed.

[March 12, 1887.—*The Common Pleas Division.*]

THIS was an appeal by the defendants from an order of Wilson, C. J., in Chambers, affirming an order of the Master in Chambers directing the defendant company "to produce all papers and documents relating to a certain investigation into the accident referred to in the pleadings herein, including the evidence or statements received and taken therein, and the report made thereupon."

Aylesworth, for the appeal.

Shepley, contra.

ROSE, J.—It is urged that these documents are privileged from production.

It appears the accident occurred on the 24th of September, the train being thrown off the track, the immediate cause not being ascertained.

Mr. Hannaford, chief engineer of the company, happened to be on the train at the time, and held an immediate investigation into its cause.

He was examined before a special examiner, and I make the following extracts from the examination:

“ A. As to the accident in question there was an investigation held on the ground, and the immediate cause of the accident was not ascertained.

Q. There was more than one investigation held—one on the ground and one in Toronto subsequently? A. That was merely adjourned for the better convenience of being all together in a room than out of doors. It was the same day.

Q. Then all the investigation there was was completed in one day? A. Yes. What took place before that was simply a talking over between the officers &c. But the investigation you will understand on that one day was to examine every one concerned in the accident, to endeavour to find out if possible the actual and immediate cause of the accident. For instance, we examined the station agent, the conductors, the brakemen, and trackmen, and others were seen. And we adjourned to Toronto to hear some further evidence of our men who were in the city and could be got at here, persons who had been present at the accident and who had passed over the track before that.

Q. Then the persons you examined were the conductor, baggageman, &c.? A. There were a great many of the men's evidence taken and given in in writing, because it was inconvenient to take them off their trains, and as it was not a legal examination we didn't think it so essential to examine them orally.

Q. The statements were taken in writing? A. Yes; everything of the most perfect character, as it would be in a Court of Justice.

Q. What became of the written proceedings that were taken there? A. I don't know. I suppose those are with the company.

Q. In whose custody would those be now? A. In the custody of the assistant general manager, Mr. Wm. Wainright.

Q. You believe now that all the evidence that was taken at that investigation is still in his custody? A. Yes. *It was very full for our own purposes, it was not intended for a purpose of this kind. We had everything, with a view of finding out for the purpose, if there was anybody to blame and what caused the accident; and everything was taken down in a systematic way for the guidance of the railway company.*

* * * * *

Q. It was for your own purposes? A. Enough may have been taken out of that to be made use of for various purposes, *but it was taken down for the purposes of the management of the line.* * *

Q. No doubt that report is still in existence with all the evidence? A. Yes; I think so, it was not taken under my supervision.

Q. It was under the supervision of the general manager? A. Yes.

Q. *Mr. Bell (the solicitor) was present?* A. *No; it would be entirely between the officers of the company.*

Q. As I understand from you without particularising, that all who would be expected to give you information on the points were summoned up before the board? A. Yes; in so far as reaching the cause of the accident: *that is what we were at, to reach the cause of the railway accident, and the result of the investigation I can give you.*"

From this evidence it appears that the papers returned to the company were the report and the memoranda of the "men's evidence taken and given in writing."

These, according to Mr. Hannaford, were not obtained for the solicitor, or for the purpose of being laid before him for advice, or in view of any impending or threatened

litigation, or after litigation commenced, but, as put by him, "for the purpose of the management of the line," "for our own purposes; it was not intended for a purpose of *this kind*"; by which I understand for use in legal proceedings.

Mr. Bell, the solicitor, was not present, and Mr. Hannaford's answer to such question is noteworthy: "No; it would be entirely between the officers of the company."

The affidavit of Mr. Bell made on the 8th June, 1886, was put in. He seems to have thought that the information was obtained, that he as solicitor and counsel for the company might advise the company as to its liability for damages arising from the accident. He says it has been used for such purpose and no other.

Even if so the report would not, nor would the evidence be privileged.

The cases of *Wheeler v. LeMarchant*, 44 L. T. Rep. N. S. 632, 17 Ch. D. 675; and *Westinghouse v. Midland R. W. Co.*, 48 L. T. Rep. N. S. 462, decisions of the Court of Appeal, the first in 1881 and the second in 1883, are directly against such contention.

The head-note in the *Law Times* in the first case is: "Where a solicitor is consulted by a client in a matter as to which no dispute has arisen, and applies to a surveyor or other third party for information necessary that the solicitor may give legal advice to the client, the communications between the solicitor and third party are not privileged from discovery in legal proceedings subsequently commenced by or against the client. By their affidavit of documents the defendants stated that they objected to produce some of the documents set forth in the second part of the first schedule, on the ground that they consisted of confidential correspondence between their former solicitors and their present solicitors, and their former estate agent and surveyor and their present agent and solicitor.

Held, (reversing the decision of Bacon, V. C.,) by Jessel, M. R., Brett and Cotton, L. JJ., that the defendants must produce the correspondence, except such, if any, as the defendants should state by affidavit to have been prepared

confidentially after the dispute had arisen between the plaintiff and defendants, and for the purpose of obtaining evidence and legal advice for the purpose of the action."

In the latter case *Baggallay and Lindley, L. JJ.*, were the Judges.

There the defendant company sought to withhold from production certain letters which had passed between the officers of the company, and between them and other persons, which makes the documents similar to those in question.

This correspondence, the head-note says, was alleged to have arisen in consequence of a claim made by the plaintiff respecting his patents, in a letter addressed to the secretary of the company, which was taken by them to be an intimation that the plaintiff intended to proceed against it, for infringement of his various patents. The letter was handed to the company's solicitor with instructions to advise the company as to the merits of the plaintiff's claim, and thereafter the matter had been conducted with the view of getting materials for a contest if necessary.

It was held that, assuming the letter to amount to a threat of litigation, the above facts did not disclose a sufficient ground of privilege.

Per *Baggallay, L. J.* (p. 464) "The first affidavit does not specify what future litigation was expected, or that the documents were submitted to the defendants' solicitors in consequence of the advice given to the defendants. It was only in case there should be some future litigation that the documents were to be so submitted. That is not a sufficient ground of privilege."

In the face of these decisions it is quite impossible to say that the documents in question are privileged.

I have dealt with this matter as if the ground of privilege had been set up in the affidavit of documents. As a matter of fact the affidavit, which was dated on the 15th of April, 1885, merely denies the possession of any documents relating to the matters in question.

I have not considered whether the evidence of Mr. Hannaford is to be considered as contradicting the affidavit,

and whether therefore receivable ; see the judgment of this Court in *MacGregor v. McDonald*, delivered 26th June, last, and a further judgment in the same matter delivered by myself in Chambers on the 1st of March, 1887,* because the case was opened by admissions of the fact that the documents in question were in the possession of the defendant company, and that the affidavit of documents had been prepared under a misapprehension of the facts : see Mr. Bell's affidavit of 8th June, 1886. The report was in fact produced in Court, and offered to the plaintiff's counsel for inspection, but he declined to look at it unless permitted to give the information as to its contents to his client.

The defendant company was apparently desirous of obtaining an opinion on the question of privilege apart from the question of the propriety of the order requiring a further and better affidavit on production, and for such purpose its counsel, as I have said, admitted at once the possession and control of the documents, and argued as to their being privileged.

I think the documents are not privileged and must be produced for inspection.

The appeal must be dismissed, with costs in the cause to the plaintiff in any event.

CAMERON, C. J.—I quite agree in the opinion that the report of Mr. Hannaford and the memoranda taken by him are not exempt from inspection by the plaintiff upon authority that is binding upon this Court. But this being so, I am quite at a loss to understand why a party is not equally entitled to obtain a knowledge of the evidence which the opposite party has to support his claim or defence. What is sought by the plaintiff here is substantially evidence, or the means of searching out and procuring evidence. The line between what may be obtained on inspection or be withheld is very fine, and to my mind scarcely perceptible. I think the right to inspection ought

*These judgments are reported together, *ante*, p. 81.

to be confined to documents in existence at the time of the contract, or created during the contract, or relating to the breach of it afterwards, written in the ordinary course of business or in pursuance of a duty, and should not extend to information obtained or reports made upon request for information by those having a right to make such request; and in case of tort, reports and information given as a part of the ordinary duty of the person making the report, and should not extend to reports made in consequence of enquiries to obtain information for the guidance of those entitled to such information. In the absence of authority to the contrary, I should have said the report and memoranda sought here would have been privileged and exempt from inspection.

GALT, J., concurred.

Appeal dismissed.

[An appeal from this decision is pending in the Court of Appeal.]

LEVY V. DAVIES.

Interpleader—Sale of goods under order—Levy of money under execution—Creditors' Relief Act, 1880—49 Vic. ch. 16, sec. 35—Costs.

A sheriff had seized goods under writs of *fi. fa.* in his hands, when the goods were claimed by a chattel mortgagee. An interpleader issue was directed, and an order was made for the sheriff to sell the goods and pay the proceeds into Court, which was done. After the claim of the chattel mortgagee had been barred a question arose as to the distribution of the money in court.

Held, that the seizure under the writs, together with the conversion into money by the sheriff under the order of the court, and the final barring of the claim of the chattel mortgagee, constituted a levying of the money under the writs by the sheriff in the sense of sec. 5 of the Creditors' Relief Act, 1880, and therefore that the money in court should be distributed ratably according to the provisions of that Act; but

Held, also, upon a liberal construction of sec. 35 of 49 Vic. ch. 16 (O.), that the execution creditors who contested the chattel mortgagee's claim in the interpleader were entitled to their costs of the interpleader as "costs of the execution" if they failed to recover them from the claimant.

[April 13, 1886.—*The Master in Chambers.*]

A SHERIFF having a number of writs of *fi. fa.* in his hands against the defendant, had seized certain goods, when they were claimed by an alleged chattel mortgagee.

Upon the plaintiff's application an issue was directed to try the chattel mortgagee's claim to the goods, and an order was made for the sheriff to sell the goods and pay the proceeds into Court to abide the result of the issue, which he did.

The chattel mortgagee being in default as to prosecuting the issue, a motion was now made by the execution creditors to bar his claim; and for payment out of Court of the moneys paid in by the sheriff.

Kappele, for the sheriff and one of the execution creditors.

Watson, C. J. Holman, Aylesworth, W. H. P. Clement, George Bell, John Greer, and Wickham, for the other execution creditors.

P. McPhillips, for the claimant.

An order was made barring the claimant with costs. The Master reserved his decision as to the distribution of the moneys in Court, and afterwards delivered it as follows.

THE MASTER IN CHAMBERS—This is a motion for a final order in interpleader, and for payment out of the money to those entitled to it.

Who are those entitled to it, is the question? On the argument the order was made barring the claimant. There are several execution creditors, and I have heard the arguments of those representing the different interests. There are two main contentions in the matter; one that the fund properly belongs to those who have been parties to the interpleader, and that all other executions should be excluded. The other that the fund is distributable under the Creditors' Relief Act, and that except for costs the interpleader executions stand in no superior position to any other execution creditor who has not by the course of the proceedings been specially excluded. To this latter opinion I incline.

In the first place it seems to me necessary to enquire, rather particularly, what is really the effect of a decision in interpleader. In the case in hand there has been no verdict, for the claimant, who asserted himself to be a chattel mortgagee of the goods, is now barred for not duly prosecuting his claim. The effect against him is just the same as would follow from any adverse verdict. On the making of the interpleader order, I have a recollection that it was by general consent, that the goods were ordered to be sold by the sheriff and the proceeds paid into Court. That was accordingly done, and the money is in Court. The issue was whether the goods were the goods of the claimant as against the executions of the execution creditors. Now if that issue had gone on to trial and there had been a verdict against the claimant, it would have been determined that the goods were not the goods of the claimant as against the executions; nothing more would have been determined. The right of the execution creditors to seize and sell the goods under their writs

would not have been established by the verdict. It was not in issue. Only the claim of the claimant was in issue. The right of the execution creditors to seize and sell was assumed, in framing the issue; provided only that the claim of the claimant was got rid of. If the judgment creditors have that right it is apart altogether from the interpleader; it exists in law upon grounds which are prior to anything in the interpleader. So that it is only the claimant's rights that were in issue, and are or can be determined by that procedure. Such indeed is the form in which the result of the interpleader is stated. The verdict must be for or against the claim of the claimant. Then the execution creditors stand as to their rights against the property, after a decision adverse to the claimant, precisely as though no claim had ever been made. The goods were converted into money during the course of the interpleader. Whenever, as here, the goods have been so converted into money by virtue of the order of the Court, it must be remembered that that is not at that stage money levied by the sheriff upon an execution. The sale is in that case under the order of the Court, and it is necessary that that truth should be adhered to for some reasons which are important, but not of importance here. The money then, the produce of the goods, so far stands in the place of the goods and subject to the same rights as the goods, just as though the goods remained in specie in the sheriff's hands.

So that in this case nothing has been decided except that the claimant has no claim. And as the claimant is now by order formally barred, and as the money is already made by the conversion of the goods, nothing now stands in the way of the judgment creditors; and at this point it is, it seems to me, that the sheriff may be said to have levied money under the executions against the judgment debtor in the sense of the 5th sec. of the Creditors' Relief Act. It is from the effect of the whole proceedings together that I think that effect follows. The sale by the sheriff was not under the executions, but under the order

of the Court; but the seizure was under the writs, and that with the conversion into money by the sheriff by the order of the Court, and the final barring of the claim of the claimant, constitutes a levying of the money under the writs, by the sheriff.

If this be not so then a very large number of cases may be taken out of the Creditors' Relief Act by simply getting up an interpleader as to the goods seized, and without any contrivance, that would happen in many cases.

It is true that money placed to abide a result will not always pass to the assignee in bankruptcy of the man who has pledged the money, as where after issue joined money was paid into Court by a defendant pursuant to a condition of a Judge's order for a commission, which defendant had obtained: the defendant having become bankrupt, the plaintiff having obtained a verdict was held entitled to the money in Court as against the assignee: *Murray v. Arnold*, 3 B. & S. 287; and where A. on a judgment against an attorney obtained a garnishing order against C., who owed the attorney a bill of costs; C. obtained further time for taxing the bill on payment into Court of £25, and the attorney before the taxation was completed executed a composition deed and gave notice to C. not to pay the amount of the bill to A.; it was held that A. was entitled to the £25: *Culverhouse v. Wickens*, L. R. 3 C. P. 295.

But in these cases the money was held to abide a result, and so the opposite party to the bankrupt in each case had an interest. Not so is it with these interpleader proceedings. There has been nothing that I can trace to fasten or pledge this fund specially to the executions of the execution creditors in the interpleader, any more than if there had never been a claim made against the goods at all. The whole effect of what has passed has been, that the claim of a claimant of the goods has been got rid of, and now the money is, as the goods were, the property of the judgment debtor, liable to the claims of the execution creditors and of all others who are by law entitled to rank with them.

No one can examine this matter, without the fact being present to his mind, that the tendency of legislation lately has been to supply the need of a bankrupt law, to secure the equal distribution of a debtor's assets among his creditors.

But there is a question of costs, and as to them I think that on a liberal construction of the language of the 35th sec. of the recent Act (49 Vic. ch. 16 (O.)), which will carry out the spirit of the clause, the interpleader costs, if they cannot be collected from the claimant, may in an equitable view be taken to be costs of the execution, for they are a disbursement necessary in the working out of the execution, and by that disbursement it is that the fund has been preserved for all.

It cannot be that it is the intention of the Act that those who have gone to this expense should lose it for the advantage of those who have been lying by, but gain by the success of the contesting judgment creditors.

It seems to me that the cheapest and best way will be, to pay out this money to the sheriff with particular instructions in the order, for its distribution under the Creditors' Relief Act, and in accordance with the foregoing, regarding the money as levied at the date of the order.

[See *Reid v. Gowans*, 13 A. R. 501, where the same point afterwards came up, but was not decided, owing to a disagreement in the Court.]

REGINA V. RILEY.

Magistrate—City and county—Jurisdiction—R. S. O. ch. 72, sec. 6.

R. S. O. ch. 72, sec. 6, does not limit the territorial jurisdiction of county magistrates, but prohibits them from acting “in any case for any town or city”—the limitation is as to the cases, not as to place, and is only partial, *i. e.*, for a city where there is a police magistrate, and then only when not requested by such police magistrate to act, or when he is not absent through illness or otherwise; and therefore in any case arising in a county, outside of a city, a county justice having jurisdiction to adjudicate while sitting in the county, may adjudicate while sitting in the city.

Legislation on the subject reviewed.

Owing to changes in the statute law the decisions in *Regina v. Row*, 14 C. P. 307, and *Hunt v. McArthur*, 24 U. C. R. 254, are no longer applicable.

[September 3, 1884—*Rose, J.*]

A motion to re-commit the defendant.

The facts appear in the judgment.

J. G. Scott, Q. C., for the Crown.

J. B. Mackenzie, for the defendant.

ROSE, J.—This is a motion to re-commit the prisoner, he having been discharged under an order made by myself on the 25th of July, directing his discharge upon a return made to a writ of *habeas corpus*.

The ground of discharge was, that James Grace, the justice of the peace for the county of Brant who heard and adjudicated upon the case in the city of Brantford, had no jurisdiction, the offence being committed in the county, as there was a police magistrate appointed for the city, following *Regina v. Row*, 14 C. P. 307, and *Hunt v. McArthur*, 24 U. C. R. 254.

This motion is not pressed to the extent of having an order go as asked, but is made with the desire of having fully considered the legislation since the decision of the above cases, to ascertain if they are declaratory of the law as it now stands.

The original order was obtained *ex parte*. On this motion I have had the benefit of a most carefully prepared and able argument on the part of the Crown, and I have also been much assisted by Mr. Mackenzie, who appeared to support the order, as I had expressed a desire to have the matter fully argued. He certainly argued the case very well.

A short history of the legislation will assist us to a conclusion.

When *Regina v. Row* was decided, (*Hunt v. McArthur* merely followed that case), the regulating statute in force was C. S. U. C. (1859) ch. 54.

Section 361 enacted that "Every city and town separated shall be a county of itself for municipal purposes, and for such judicial purposes as are herein specially provided for in the case of all cities, but for no other."

Section 365 enacted that "justices of the peace for a county in which a city lies shall as such have no jurisdiction over offences committed in the city." * *

It may be this section was unnecessary, in view of section 361, as will hereafter be pointed out.

The law standing thus, the case of *Regina v. Row* was decided. The decision there shortly was that "the justices of the peace of the county of Middlesex acting in the matter therein referred to (arising in the county), had no jurisdiction to administer oaths to or examine witnesses within the city of London," and that the Imperial Statute, 28 Geo. III. ch. 49, sec. 4, was local in its character, and not in force in this Province.

The section of 28 Geo. III. referred to enacted that justices for counties at large might act as such within any city *being a county of itself*, situate therein, or adjoining to such county; but were not to act in matters *arising within such city*, if they were not also justices for the same.

I have italicised what seem to be the material words of this section, and the effect was that, as to matters arising in the county, the justices for the county could as such act within the city.

Section 361, above referred to, declaring the city to be a *county of itself*, and there being no legislation similar to 28 Geo. III. in force, *Regina v. Row* was a direct authority that the justice of the peace whose commission was for the county could not, under such commission, act as a justice within the city, it being a separate county.

Then, apparently to introduce an enactment similar to 28 Geo. III., the following words were added to section 365 by section 360 of 29 & 30 Vic. ch. 51, (1866): "And any justice of the peace for the county may issue any warrant or try or investigate any case in a city when the offence has been committed in the county or union of counties in which such city lies, or which such city adjoins" Reading these words with those I have above quoted of section 365, we find the law thus to be as in England under 28 Geo. III.

The 365th section of the C. S. U. C. also required the warrants of county justices to be endorsed, before being executed in a city *in the same manner as required by law when to be executed in a separate county*.

Section 369 provided for the appointment of police magistrates in towns and cities, who by sec. 375 were *ex officio* justices not only for the city or town, but also for the county.

C. S. U. C. ch. 3, being an Act respecting the Territorial Division of Upper Canada, in force when *Regina v. Row* was decided, declared (sec. 2), that the city of London should not form part of the county of Middlesex for municipal purposes. That section said nothing as to judicial purposes. This was provided for by sec. 361.

We will now endeavor to ascertain the state of the law at the time when the magistrate who committed Riley was appointed, and at the date of the commitment. The commission appointing James Grace, amongst others, a justice of the peace for the county of Brant, was a special one, dated 12th April, 1875. Brantford became a city in 1877. No commissions for the city of Brantford, separate from the county, have been at any time issued.

Sec. 361 of C. S. U. C. ch. 54 was omitted from 36 Vic. ch. 43 (O.) *i. e.*, The Municipal Act of 1873, and was repealed by 40 Vic. ch. 7, schedule B. (1877.)

By the Act, R. S. O. (1877) ch. 5, being an Act respecting the Territorial Division of Ontario, Brantford was united and formed part of the county in which it was situate, *i. e.*, Brant, for judicial purposes, but remained separate for municipal purposes. By sec. 1 of this chapter the territorial division of the county of Brant was declared to consist of the several townships, the city of Brantford, and the town of Paris.

It is argued, therefore, that the commission to Mr. Grace was for the territorial division of the county of Brant, including the city of Brantford, united to the county also for judicial purposes, and that his jurisdiction was over any and every part of the county, except where expressly taken away by statute. The commission did not contain, as to the city or any other portion of the county, any *non-intromittant* clause.

Cities thus ceasing to be separated from counties for judicial purposes, sec. 365, C. S. U. C. ch. 54,—amended by sec. 360 of 1866—was repealed by the Law Reform Act of 1868. The provision as to “backing” warrants thus disappeared, as also the provision authorizing justices of the peace to act in the city in county cases.

Neither of these provisions has been re-enacted.

We find, however, that sec. 11 of the Law Reform Act continues the provisions of sec. 373, of 1866, providing that “no other justice of the peace, (*i. e.*, than a police magistrate,) shall adjudicate upon, admit to bail, discharge prisoners, or otherwise act, except at the Courts of General Sessions of the Peace, in any case *for any* town or city where there is a police magistrate, except in case of the illness or absence, or at the request in writing, of the police magistrate.”

This section 373 appears in the Municipal Act of 1873 as No. 307, and, in substance, in the Police Magistrates Act, R. S. O. ch. 72, as sec. 6. The request by that section is not required to be in writing.

It will be observed that the words of sec. 365, C. S. U. C. ch. 84, are "offences *committed in the city*," and of sec. 6, R. S. O. ch. 72, "in any case *for any town or city*." The latter clause is clearly wider and probably will extend to any case which the police magistrate is by any statute permitted or required to adjudicate upon, such as where the offence is committed outside of the city and the offender is found within the city. See 32 & 33 Vic. ch. 30, sec. 1 (D).

The present legislation may be said to consist of R. S. O. ch. 72, 41 Vic. ch. 4 (O.), and the Consolidated Municipal Act, 1883, sec. 416, *et seq.*

It is admitted that the only clause of a *non-intromittant* character, limiting the jurisdiction of justices of a county, is R. S. O. ch. 72, sec. 6.

It was argued that as the enabling clause introduced by 29 & 30 Vic. ch. 51, sec. 360, has been repealed, and not re-enacted, it must be taken to be that the Legislature did not intend justices for the county to adjudicate or act in the city at all. It is answered that this clause disappeared because, the clause as to cities being separated from counties being repealed, its necessity had been taken away, *cessante ratione cessat lex*.

I observe that in 41 Vic. ch. 4, sec. 4, it was thought necessary to empower a police magistrate to act anywhere within the county for which he is *ex-officio* a justice of the peace. This possibly was thought necessary, as he by that clause was empowered to act in certain cases where two or more justices had jurisdiction. The power to appoint justices of the peace is conferred upon the Lieutenant-Governor by R. S. O. ch. 71.

The principles of law applicable to this case are found in *Burn's Justice of the Peace*, Vol. III, p. 130, citing *Blankley v. Winstanley*, 3 T. R. 279; and in *Paley on Convictions*, 6th ed., p. 32; *The King v. Sainsbury*, 4 T. R. 451; *Langwith v. Dawson*, 30 C. P. 375; *Regina v. Berry*, 9 P. R. 123; *Re Hamilton Election Petition*, 10 U. C. L. J. N. S. 170; *Regina v. Row*, *supra*; *Hunt v. McArthur*, *supra*.

It will only be necessary to refer particularly to *The King v. Sainsbury*, at p. 456, where Lord Kenyon, C.J., says: "That the King may grant a commission of the peace for a county, and that the jurisdiction of such justices may pervade the whole county, cannot be doubted. Neither can it be disputed that he may grant commissions of the peace for any particular district in the county, and that that sub-division may have justices of its own, exclusive of the jurisdiction of the justices of the county at large; *but the latter can only be effected by a non-intromittant clause, prohibiting the county justices from interfering in that district.*"

I cannot say that I have any doubt as to the conclusion to be deduced from the legislation referred to. In my opinion it is this.

The Lieutenant-Governor has power to issue a commission of the peace for any county.

The county of Brant includes the city of Brantford, both territorially and for judicial purposes, although not for municipal purposes.

The commission to Mr. Grace was for the county of Brant.

It contained no non-intromittant clause.

Although the city of Brantford has a police magistrate and justices for the city, the justices for the county have concurrent jurisdiction, except where expressly excluded.

The clause in the statute prohibiting the county justices from acting in cases for the city, does not say they shall not act *in the city*, *i. e.*, does not limit their territorial jurisdiction, but prohibits acting "in any case for any town or city"; that is, the limitation is as to the cases, not as to place. This limitation is only partial, *i. e.*, for a city where there is a police magistrate, and then only when not requested by such police magistrate, or when he is not absent through illness or otherwise.

This presupposes jurisdiction to act in the city, but limits, or suspends such jurisdiction, when there is a police magistrate acting, and the limitation or suspension is only in

cases for the town or city, that is in cases in which the police magistrate has prior jurisdiction. This provision was probably introduced to prevent unseemly squabbling between magistrates having concurrent jurisdiction, as was the case in *The King v. Sainsbury*, where it was held that the magistrate first acting had exclusive jurisdiction. Lord Kenyon, C. J., in that case, remarks on the unseemliness of such conduct.

In any case arising in the county, outside of the city, a county justice having jurisdiction to adjudicate while sitting in the county, may adjudicate upon such case while sitting in the city, but has no power to sit in the city and try cases which the police magistrate ought to try, unless the police magistrate is ill, absent, or requests him to act.

If an offence is committed in the county and the offender is found in the city—this, probably, is a case for the city, and as such the police magistrate should act; but as by sub-sec. 5 of sec. 433 of the Municipal Institutions Act of 1883, “No police magistrate need act in any case arising outside of the limits of the city, town, or place for which he is police magistrate, unless he sees fit so to do,” it would seem as if the county justices might act in such a case, and sit in the city, if he desire.

It follows, therefore, if I have taken the correct view, that the decisions in *Regina v. Row*, and *Hunt v. McArthur*, are no longer applicable, and that the order discharging Riley should not have been made.

As the Crown may, if it desire, cause Riley to be indicted, it is not necessary to act upon the power said to be vested in me to re-commit: *Rex v. Marks*, 3 East 157, is cited as the authority for this proposition. It was admitted that I have no power to set aside my own order, it having been acted upon. If I had, it would not be proper to do so, as the prisoner has been discharged. There will, therefore, be no order.

KNAPP V. KNAPP.

Interim alimony—Disbursements—Separate estate—Status of married women.

The peculiar practice of awarding interim alimony and disbursements in alimony suits is founded on the presumption that the husband has everything and the wife nothing, but when the contrary appears the presumption is done away; and the Court will, on applications for *interim* alimony, consider the question of the wife's ability to maintain herself out of separate estate or other sources of income, such as her earnings and allowances from her friends.

And where the wife had been living apart from her husband for five years, and had been supporting herself out of the rents of houses owned by her, and by taking boarders, and through assistance rendered by members of her family, the Court refused to award *interim* alimony, but directed the husband to pay the prospective cash disbursements of the plaintiff's solicitors upon their undertaking to account.

Per BOYD, C. The change in the status of married women under recent legislation has no effect upon the law as to disbursements in actions for alimony, unless the wife is actually in receipt of such independent and separate means of support as will enable her to live and pay the costs of litigation without alimention pending the action for alimony.

[March 5, 1887.—*The Chancery Division.*]

THIS was an appeal by the defendant from an order of Proudfoot, J., in Chambers, of the 13th Dec., 1886, reversing the order of the local Master at Chatham and directing the defendant to pay *interim* alimony and disbursements to the plaintiff.

The appeal was argued before the Divisional Court on the 19th February, 1887.

H. J. Scott, Q. C., for the appellant. The Court should not intervene where the wife has property sufficient to maintain herself during the progress of the suit: *Coombs v. Coombs*, 1 P. & D. 218; *George v. George*, 1 P. & D. 554. Even if the plaintiff is entitled to *interim* alimony she is not entitled to disbursements: *Smith v. Smith*, 6 P. R. 51; *Bradley v. Bradley*, 3 Ch. Chamb. R. 329. The Married Women's Property Acts have made a difference in the status of married women and the question of *interim*

alimony must be considered in the light of this legislation :
Magurn v. Magurn, 10 P. R. 570.

Holman, for the respondent.

BOYD, C.—The origin of the peculiar practice as to costs and alimony in matrimonial causes, and which has been adopted by the Court in this country in actions for alimony, is thus defined by the Master of the Rolls in *Robertson v. Robertson*, 6 P.D. at p. 122 : “ Now on principle it is plain that the whole foundation of the rule depends on the liability of the husband to pay the necessary and fair costs of the wife’s defence. I take it that that rule is founded on the old English law, which gave the whole personal property of the wife to the husband, and gave him also the income of her real estate ; so that in the absence of a settlement (which, as we all know, is a comparatively modern introduction) she was absolutely penniless, and, therefore, the Ecclesiastical Court not only provided for the costs of her defence, but also gave her alimony *pendente lite* so as to provide for her maintenance.”

With this exposition of the law agrees the judgment of Sir Wm. Scott (Lord Stowell) in *Wilson v. Wilson*, 2 Hagg. (Con.) at p. 204, to the following effect : “ In suits instituted either by the husband or the wife, (for I consider that fact to be indifferent), the wife is a privileged suitor as to costs and alimony ; and on the same principle, that the whole property is supposed, by law, to be in the husband. If the wife therefore is under the necessity of living apart, it is also necessary that she should be subsisted during the pending of the suit ; and that she should be enabled to procure justice, by being provided with the means of defence. This arises out of the ordinary condition of conjugal society, and the state of the property, between the parties, as usually vested, under the more ancient law of the kingdom. If it should happen, as by the introduction of other principles, and operation of law, it often may, that the wife has an income correspondent to her own expenses, and the necessary expenses of the suit (for both must ap-

pear) there is no longer the same reason, that she should be a privileged suitor." Cases are cited in the note, p. 206, which shew that the practice is founded on the presumption that he had everything and the wife nothing, but when the contrary appeared the law and presumption were done away. The practice appears well settled that on application for interim alimony the Court will consider the question of the wife's ability to maintain herself out of separate estate or other sources of income—such as her own earnings: *Goodheim v. Goodheim*, 2 Sw. & T. 250; and allowances from her friends: *Eaton v. Eaton*, 2 P. & D. 51. In *George v. George*, 1 P. & D. 554, where husband and wife had been living apart for several years and the wife had supported herself during the separation and was still able to do so, alimony pending suit was refused by Lord Penzance. In *Coombs v. Coombs*, 1 P. & D. 218, where the husband's income did not exceed £60 a year and he had handed to her shortly before the suit a sum of £70, which was equivalent to the sum he had received with her on the marriage, the same Judge declined to make any allotment of alimony *pendente lite*.

The special features of this case are, that the wife has a separate estate and income and has been for over five years living separate from her husband and supporting herself. This would, *primâ facie*, imply that she was still able to support herself pending this litigation, and if she succeeds the Court can deal with her right to support, as was suggested in the case last cited. The Court will go into evidence to ascertain the amount of her income if that is in dispute, as it will into that of the husband in like circumstances, and this may be done in the first instance, or it may be referred to the Master for that purpose: *Watts v. Watts*, 28 L. J. Mat. C. 125, and *Harker v. Harker*, 37 *ib.* 11. Even if she has some separate income, but not enough for her proper maintenance (considering her former position and station in life when in connubial relationship) it will be a factor in fixing the amount to be allowed out of her husband's income: the usual plan being to allow one-

fifth of the joint incomes in ordinary cases: *Browne on Divorce*, 3rd ed., p. 175.

Upon the present application the question is, whether the plaintiff has made out a case for the allowance of interim alimony. She is fifty-five years old now, and has been supporting herself out of the rents of the houses which she has, and by taking in boarders, and by means of some assistance rendered by members of her family, she and they all living together. The complaint is that her husband has deserted her, and is now consorting with other women. When the husband is said to have left her, there was no trouble except about money matters, arising from her children of another marriage living with her in the defendant's house. In my opinion she makes out no sufficient case for the allowance of alimony at present, though she may be entitled to something for permanent alimony, if she is successful in the action. She does make out a case for the allowance of some disbursements to enable her to bring this case on for trial. While she can maintain herself, as she has been doing for the past years, it would appear that the payment of disbursements for costs would be a matter of difficulty if not of impossibility, and following *Belcher v. Belcher*, 1 Curt. 444, I think the order in appeal should stand to this extent. The disbursements to the solicitor should be fixed on the undertaking of the solicitor to account for the amount allowed as proper disbursements, and to refund anything that may be taxed off in the event of the plaintiff being awarded only disbursements. I notice statements in the defendant's affidavit to the effect "that the plaintiff has from her own property at the present time a larger net income than I have," which, if true, would disentitle the plaintiff to receive any alimony, but it is not convenient now to investigate that line of inquiry at any further length.

It does not appear that the legislation respecting married women has wrought any change in the law as to the payment of disbursements in England. It can only have that effect here, when the wife is actually in receipt of such

independent and separate means of support as will enable her to live and pay the costs of litigation without alimention pending the action for alimony.

The order in question being affirmed in part and reversed in part, I am of opinion that no costs of appeal should be given to either party.

FERGUSON, J.—The question is, as to whether or not the order in the plaintiff's favor for interim alimony and disbursements should stand. There are cases in our own Court going to shew that when the marriage is either proved or admitted, the order for interim alimony will be almost as of course. Of such cases are *Nolan v. Nolan*, 1 Ch. Chamb. R. 368, and *Carr v. Carr*, 2 Ch. Chamb. R. 71. The cases, however, are not all of this kind. In *Bradley v. Bradley*, 3 Ch. Chamb. R. 329, which professedly followed *Goodheim v. Goodheim*, 2 Sw. & T. 250, the learned referee said: "There is, however, another point to be considered. These parties have been living separate and apart for over four years, and the plaintiff does not in her affidavit allege that she is in any want of means, or that she requires alimony for the purposes of her support. The husband, in his affidavit, states positively that the plaintiff is in far better circumstances than he is. He says that when they separated he gave her \$400, and the household furniture, and that she is now keeping a boarding-house, with from eight to fifteen boarders; that she owns a lot of land on which is a valuable quarry, from which she derives a considerable income; that she has money to a considerable amount invested at interest; and that she has stated she has more money to loan." None of these statements being denied, the order was refused.

There is much in the early case *Soules v. Soules*, 3 Gr. 113, going to shew that interim alimony is for the purpose of meeting necessities. And so far as one can ascertain from the very short report of the case *Smith v. Smith*, 6 P. R. 51, it is to, or towards, the same effect.

In the present case the defendant in his affidavit says that the plaintiff is possessed of five good dwelling houses in the town of Chatham, in her own right, for three of which she receives six dollars and fifty cents per month, and for the fourth eighteen dollars per month, rent, and that she resides in the fifth one ; that he believes the plaintiff has other means also, including money in the bank, and in the hands of her solicitors, and that the plaintiff has from her property at the present time a larger net income than he has.

On this subject the plaintiff in her affidavit says that she is in straightened circumstances ; that except her household furniture she has no means, save some real estate whereon there are some dwelling houses that she is unable to rent for more than thirty-six dollars per month when they are tenanted, but she has been unable to procure steady and permanent tenants, and that the houses have been a large proportion of the time vacant ; that in the year 1885 and the present year she has been obliged to expend upon these houses for repairs upwards of two hundred dollars, and that her net income from all her property, after deducting a fair allowance for the cost of repairs, insurance, and taxes, does not amount to two hundred and twenty dollars a year, out of which sum she has to pay the interest upon a mortgage, amounting yearly to one hundred and eighty dollars, but that one hundred and fifty dollars a year of this is payable to her children and is received by her and applied to the purposes of maintaining the household, which consists of her daughter, herself, and her son Joseph, who is about fourteen years old ; that her daughter contributes to the general support by teaching music ; that she has been obliged to take in boarders to supplement the income, and she says that were it not for the small additional amounts that she thus obtains and the support and assistance that she gets from her two adult sons, she would be quite unable to maintain herself. As I understand, the parties have been living apart since the year 1871.

In the case *George v. George*, 1 P. & D. 554, the husband was a contractor, with a net annual income of £225. He had for several years been living apart from his wife, and she was in service and received £14 a year wages, besides being provided with board and lodging.

The Judge Ordinary in giving judgment, said: "The wife is able to support herself by means of her own exertions, and she has long lived apart from her husband without an allowance. If I were to allot alimony, I should be placing her in a better position than she was in before she instituted this suit. I shall therefore make no order for alimony." In *Coombs v. Coombs*, 1 P. & D. 218, the learned Judge said: "*Alimony pendente lite* is an *ad interim* arrangement. It is payable pending the litigation which is to determine whether or not the wife was right in withdrawing from her husband. Its payment is therefore enforced on the ground of *necessity only*, the supposition on which it is founded being that the wife has no other means of support, and that unless the husband is ordered to give up a fair proportion of his income to her she will be without the means of subsistence."

In the case *Wilson v. Wilson*, 2 Hagg. (Con.) at p. 204, it is said that in suits between husband and wife, the wife is a privileged suitor as to costs and alimony, and on the principle that the whole property is supposed to be in the husband. "If the wife therefore is under the necessity of living apart, it is also necessary that she should be subsisted, during the pendency of the suit; and that she should be enabled to procure justice, by being provided with the means of defence. * * If it should happen * * that the wife has an income correspondent to her own expenses and the necessary expenses of the suit (for both must appear), there is no longer the same reason, that she should be a privileged suitor." In that case the parties were as to means about on an equality, and the order was refused.

In the case *Belcher v. Belcher*, 1 Curt. 444, it was held that the husband is liable for the costs of the wife,

unless she has a separate income sufficient for her own support and for the payment of her costs.

In the present case the plaintiff has for several years been living apart from her husband, the defendant. It seems undeniable upon the affidavits that she has property of her own to a considerable amount. She states the way in which she has lived and is living, and notwithstanding the complaints that she makes, one cannot, I think, fairly say that an allowance for interim alimony to be paid by the defendant is a *necessity* to her, or that she cannot reasonably continue to maintain and support herself during the pendency of the suit as she has hitherto done, and I think the fair meaning of the authorities to which I have referred, applied to the facts appearing in this case, indicates that she is not entitled to the order for interim alimony, although at the time of the argument I inclined strongly to the contrary opinion.

As to the costs or disbursements, I do not think it appears that the plaintiff is in a position to pay or advance these, and looking at the cases in the footnotes to the case *Wilson v. Wilson*, before referred to, as well as others, I am of the opinion that the order as to these should be affirmed.

PROUDFOOT, J., took no part in the judgment.

FRASER ET AL. V. JOHNSTON ET AL.

Jury notice—Equitable claims—Demurrer.

Where the plaintiffs claimed specific performance of a contract to supply them with milk for a cheese factory upon certain terms, and in the alternative damages, and the defendant asked for rectification of the contract, a jury notice was struck out.

Held, that where a party seeks equitable relief to which he is not entitled, the opposite party should, unless in a very clear case, demur, instead of attacking the pleading indirectly by asking to have a jury.
Bingham v. Warner, 10 P. R. 621, commented on.

[March 14, 1887.—*Boyd, C.*]

APPEAL by the defendants from an order of the local Master at Goderich striking out the jury notice filed and served by the defendants.

The action was for specific performance of an alleged contract by the defendants to supply the plaintiffs with milk for their cheese factory upon certain terms, and in the alternative for damages.

The defendants, among other defences, alleged that the contract as set up by the plaintiffs was not as intended by the parties, and claimed that it should be reformed.

The jury notice was struck out on the ground that the action was one that before the Judicature Act could have been tried only in the Court of Chancery.

Hoyles, for the appeal. The plaintiffs cannot get rid of the jury notice by claiming specific performance of a contract of which the Court will not decree specific performance: *Bingham v. Warner*, 10 P. R. 621. As to the defendants' claim for rectification of the contract it is simply a matter of defence, and not an equitable claim at all.

C. J. Holman, contra.

BOYD, C.—If this matter had come before me in the first instance I do not know that I should have acted as the Master has done; but as it is I must be quite satisfied that his order is wrong before I can reverse it. In this case

there is no strict statutory right to have a jury. One party seeks specific performance and the other rectification of a contract. Upon the pleadings as they are I do not clearly see that the Master was wrong, and I must affirm his order. I do not altogether approve of the practice in *Bingham v. Warner*, if it is to be regarded as of universal application. I think that if the plaintiff is not entitled to the relief he asks there should be a direct attack upon the pleadings by demurrer, unless in a very clear case such as *Bingham v. Warner*.

Appeal dismissed.

HOOEY ET AL. V. GILBERT ET AL.

Discovery—Examination of defendants before statement of claim—Ex parte order.

In an action by creditors of the defendant R. to set aside conveyances by him to the defendant G. as fraudulent, the plaintiff swore that it was necessary to have an examination of the defendants before delivering the statement of claim, in order that it might be framed with proper particularity as to the fraud, of which they had no personal knowledge, and a Local Judge, upon the application of the plaintiff *ex parte*, made an order for such examination.

Held, that the order should not at any rate have been made *ex parte*; and that in this case the order should not have been made at all, the position of a defendant resisting a claim as to which he has no personal knowledge, and of a plaintiff advancing such a claim being vastly different.

[April 2, 1887.—*Rose, J.*]

THIS was an action by the plaintiffs, on behalf of themselves and all other creditors of the defendant Row, to set aside conveyances of land and chattels made by the defendant Row to the defendant Gilbert, as fraudulent.

The local Judge at Belleville made an order *ex parte* on the application of the defendants, allowing them to examine the defendants before delivering their statement of claim, from which the defendants on the 4th March, 1887, appealed.

C. J. Holman, for the appeal. The order should not have been made *ex parte*: *Hamilton v. Tweed*, 9 P. R. 448; *Wigle v. Harris*, 9 P. R. 276; *Grand Trunk R. W. Co. v. Ontario and Quebec R. W. Co.*, 9 P. R. 420; *Thomas v. Storey*, 11 P. R. 417. This was not a case of emergency like *Gordon v. Phillips*, 11 P. R. 540; *Tate v. Globe Printing Co.*, 11 P. R. 253; *Fisken v. Chamberlain*, 9 P. R. 283; *Boulton v. Blake*, 11 P. R. 196. The affidavit filed by the plaintiffs was not sufficient to support the order.

Aylesworth, contra. This is not a case of "extraordinary discovery," which should only be granted in an emergency. It is not the examination of witnesses which is sought, but that of the parties to the suit. The plaintiffs are seeking now what they can get as a matter of course at a later stage of the action, and what they do not now allege in their statement of claim they can introduce by amendment afterwards; but is it not simpler and better in every way that they should be allowed to examine now, and frame their statement of claim properly at first? The defendant Row has not appeared to the action, and as to him there never will be a stage at which he can be examined, if not now. In this action the plaintiffs must set out with particularity the matters of fraud of which they complain, while all they know at present is that there was the conveyance, and that there are creditors. Doubtless the order should not have been made *ex parte*, but it can be now affirmed after both sides have been heard, so that is only a question of costs. I rely upon *Gordon v. Phillips*, *supra*.

ROSE, J.—This was an appeal by the defendants from an order of the learned local Judge at Belleville, under rule 285, for the examination of the defendants before statement of claim. The order was made *ex parte*.

The affidavit on which the order was founded discloses the nature of the action, which is by the plaintiffs, who sue as well on their own behalf as on behalf of all

other creditors of John Bleeker Row, to set aside an alleged fraudulent conveyance of land, and a further alleged fraudulent conveyance of chattels, made by the defendant Row to Mary Ann Gilbert, a sister of Row.

2. That Row was heavily indebted to the plaintiffs and others at the time of the conveyances, which purported to convey all the real and personal property of Row.

3. That the property was worth a great deal more than the apparent consideration.

4. That since the conveyances Row had been arrested under a writ of *capias*, at the instance of one St. Charles and that one Kercheson had recovered judgment in another action against Row.

5. "That it is necessary that the defendants should be examined under oath for discovery of particulars *in order to counteract the influence of an alleged fraudulent disposition of the property* mentioned in paragraph three of this affidavit, and that it is in my belief in the interest of justice that the defendants be so examined before the plaintiffs deliver their statement of claim, for without such examination the plaintiffs are in the dark, and cannot prepare their statement of claim with any certainty."

Mr. Holman objected that the affidavit does not state that the plaintiffs believe that they have a good cause of action, the amount of their debt, or the dates of the conveyances.

The date of each conveyance is given in the endorsement on the writ of summons, as the 24th of January, 1887; the one being registered on the 25th, and the other filed on the 24th of the same month.

I confess I am completely at a loss to know what is the meaning of the italicised words in the above 5th paragraph, and I am equally at a loss to know what further knowledge the plaintiffs required to enable them to prepare the statement of claim.

If to the facts set out in the affidavit are added general allegations of a fraudulent scheme and contrivance to defeat, defraud, hinder, or delay creditors, and want of con-

sideration, what more would be required? The plaintiffs under such averments could prove, if the facts warranted it, so much as would entitle them to a decree.

I can understand that the plaintiffs did not know whether the conveyances were fraudulent or not, and desired before incurring the risk of costs to fish out the facts from the defendants.

Unless one assumes that the defendants have been guilty of a fraud, such enquiry before statement of claim would seem unreasonable. As no such assumption can be made, I think before the plaintiffs are permitted to put the defendants to the annoyance and loss of time consequent upon an examination, they must file and serve their statement of claim. It may be upon the facts admitted in the statement of defence, if any be filed, that no necessity for examination will arise, or it may be that no defence will be made.

Having before me the cases of *Gordon v. Phillips*, 11 P. R. 540; *Boulton v. Blake*, *ib.* 196; *Tate v. Globe Printing Co.*, *ib.* 253; *Wallis v. Newton*, 7 C. L. T. 138; *Vidal v. Accident Insurance Co. of North America*, *ib.* 166; and the authorities referred to in these cases, I have availed myself of the opportunity of conferring with the learned Chancellor, and am permitted to say that he quite agrees that this is not a case in which such an order would be in the furtherance of justice.

In *Boulton v. Blake*, that learned Judge says: "No doubt this right of extraordinary discovery must be jealously guarded lest it be abused, and it should, under rule 285, be conceded only where it is clearly proved to be necessary for the furtherance of justice."

In *Wallis v. Newton*, *supra*, the defendant did not know how much of the work had been done by the plaintiff, and as his defence was under an agreement to which he was not a party, and the work done under which he was not cognizant of, it was manifestly not in furtherance of justice to require him to put in a formal statement of defence before he had an opportunity to cross-examine the party who knew all the facts.

I am also informed by the learned Chancellor that it was stated that the defendant, not having any independent means of knowledge, might find after examining the plaintiff that he could not make defence.

The position of one defending a claim as to which he has no personal knowledge, and of a plaintiff advancing a claim of which he has no knowledge, are in most cases vastly different, but in any and every case the "right of extraordinary discovery must be jealously guarded lest it be abused."

In my opinion, to allow discovery in this action, at this stage, would be an abuse of the right.

The order was granted *ex parte*. This should not have been. Certainly, if an extraordinary proceeding is to be adopted, it should be upon notice, unless a very clear case is made for an *ex parte* order. We thought *Thomas v. Storey*, 11 P. R. 417, was not, and that *Munn v. McConnell*, 7 C. L. T. 169, was a case in which an order might be made *ex parte*.

In the latter case the benefit of the order might have been prevented if notice had been given. See *Hennessey v. Rohmann*, 36 L. T. Rep. N. S. 51.

I think the appeal must be allowed, and the order of the learned local Judge set aside, with costs to the defendants in any event of the cause.

RE HAGUE, TRADERS BANK V. MURRAY.

Costs—Executor—Taxation—Moderation.

Bills of costs for services rendered to an estate after a testator's death, down to the date of an order for the administration of the estate, were paid by the executor after the order and pending administration proceedings.

Hehl, that there could be no taxation of the bills as against the executor at the instance of creditors, but that the bills should be moderated. So far as the solicitors were concerned the payment by the executor was to be regarded as payment of the bills, and to obtain a taxation after payment a case would have to be made against the solicitors.

Practically the moderation might be so conducted, if warranted by special circumstances, as to differ but little from a taxation.

[April 6, 1887.—*Boyd, C.*]

AN appeal by the plaintiffs and the Central Bank of Canada, creditors of the estate of one Hague, deceased, which was being administered by the Court, from a certificate of the Master in Ordinary made in the course of the administration proceedings.

Lefroy, for the appeal.

Reesor, contra.

BOYD, C.—The single point of this appeal is, whether costs paid by the executor should be moderated or taxed. The bills of costs are for services rendered to the estate after the testator's death down to the date of the administration order, which were paid by the executor after the order and pending administration proceedings. The solicitors are not before the Court; so far as they are concerned this payment by the executors must be regarded as a payment of the bills. Whether it is a proper payment or not, or to what extent it should be allowed, these questions may be before the Master, but do not arise on his present ruling. Being thus paid, there can be no taxation of these bills (using that word in its proper legal sense) unless as against the solicitors, and no case is made

(so far as argued before me) to shew that there could be such a taxation after payment : *Re Dickson*, 8 DeG. M. & G. 655 ; *Re Chowne*, 52 L. T. N. S. 75. As against the trustee or executor who has paid the bills there can be no taxation. The substitute for taxation is, that as against him the bills should be moderated, which the Master has directed in the present case : *Re Prees*, 35 Beav. 34. Practically this moderation may be so conducted (if warranted by special circumstances) as to differ but little from a taxation. In *Lady Langford v. Mahony*, 4 Dr. & War., at p. 110, Sugden, L. C., said that in moderating a bill the Master will revise the items in a manner similar to taxation, and if any charges appear not to be proper they will be disallowed to the trustee : S. C. 2 Con. & Law. 328. The practice as I have endeavoured to state it is recognized as in force in this country by Mowat V. C., in *McCargar v. McKinnon*, 17 Gr., at p. 527. The result is, that this appeal should be dismissed, with costs.

Lefroy subsequently asked that the costs should be out of the estate, as the appeal had been taken for the benefit of the creditors.

BOYD, C., directed that the respondent's costs should be paid out of the estate instead of by the appellants.

CANADIAN BANK OF COMMERCE V. MIDDLETON.

Costs, security for—Issue arising out of garnishment proceedings—Interpleader issue.

Where one of the parties to an issue arising out of garnishment proceedings is out of the jurisdiction, there is power under Rule 375 to order security for costs ; but

Semble, owing to there being no rule in Ontario similar to the English Rule 864 of 1883, there is no power to make such an order in an interpleader issue.

Belmonte v. Aynard, 4 C. P. D. 352, and *Tomlinson v. Land and Finance Corporation*, 14 Q. B. D. 539, discussed.

[March 26, 1887—*The Master in Chambers.*]

AN issue having been directed to try the right to certain moneys claimed by the plaintiffs under garnishment process, a question arose as to whether the claimant, who resided abroad, should be ordered to give security for costs.

The facts appear in the judgment.

Walter Macdonald, for the plaintiffs.

McMichael, Q.C., for the claimant.

THE MASTER IN CHAMBERS.—This is a garnishment proceeding. The Bank of Commerce recovered judgment against G. R. Middleton. One McQuarrie, who *was*, at any rate, debtor to G. R. Middleton, made an assignment to Mr. Clarkson under the Act of 1885, for the general benefit of creditors. There are now dividends in the hands of Mr. Clarkson payable on that debt of McQuarrie, and upon the bank attempting to garnish those dividends in the hands of Mr. Clarkson in satisfaction of their judgment, it is found that Mr. Herbert N. Middleton, who lives in Minnesota, U. S., now claims to be the assignee of that debt to G. R. Middleton due from McQuarrie's estate, and by consequence claims the dividends now in Mr. Clarkson's hands.

The question now before me is, whether Mr. Herbert N. Middleton, the now claimant, who is living out of the

jurisdiction, can be called upon to give security for costs upon the issue to be raised, to try his right to the dividends, as against the garnishment of the judgment creditors, the bank. I think he must give such security.

In a garnishment the claim to the debt sought to be garnished is very like in its circumstances to the claim made on a sheriff by a claimant of the goods seized by the sheriff under a *fi. fa.* Both proceedings are for the purpose of enforcing the payment of a judgment debt out of the property of the judgment debtor—the *fi. fa.* from his goods and chattels—the garnishment from a credit due to him; and a claimant, therefore, of the particular property sought to be so applied stands much in the same position whether it be a claim to goods and chattels, or a claim to a credit, alleged to belong to the judgment debtor. Yet it seems to me that in Ontario there is a right to security for costs from a foreign claimant in the case of a garnishment, and that there would be no such right on a sheriff's interpleader, where goods seized under a *fi. fa.* have been claimed.

In *Belmonte v. Aynard*, 4 C. P. D. 352, there is a decision of the Court of Appeal that where one of the defendants in an interpleader issue is really interested in the result thereof as a plaintiff, he is not entitled to call upon the plaintiff in the issue to give security for costs, upon the ground that the latter is a foreigner residing abroad. That case is not a sheriff's case at all, but the reasoning in it shews, and another case I shall presently cite shews, that where there is a claim to goods seized by a sheriff under a *fi. fa.*, the claimant and the judgment creditor are both substantially plaintiffs, and that one of them therefore cannot call upon the other for security for costs, on the ground of foreign residence. By the general rule which regulates security for costs on such a ground, a defendant may call upon a plaintiff, but a plaintiff cannot call upon a defendant, nor can a plaintiff call upon another plaintiff.

Now the execution creditor is a plaintiff in reality, because he is seeking actively to enforce payment of his debt out of the goods, and so the claimant is actively seeking to

enforce the delivery of them to himself, because he claims them to be his own property, and not liable to the execution. Both parties are actors, and both are substantially in the position of plaintiffs. I need hardly say that it is quite immaterial how the parties may be designated in the issue ordered to be tried.

I think, therefore, that by the law in England, when the case in 4 C. P. D. 352, was decided, an execution creditor could not in interpleader enforce security for costs from a foreign claimant, and that such is the law here now in interpleader.

But in England, in 1883, the Court adopted new rules relative to interpleader, and among them is the following, rule 864, 4th ed. of *Wilson's* Judicature Acts, page 485: "The Court or a Judge may, in or for the purposes of any interpleader proceedings, make all such orders as to costs and all other matters as may be just and reasonable." Under that rule it is that the Court has felt authorized to order security for costs against a claimant or a judgment creditor where it is "just and reasonable."

Under it the Court of Appeal, in *Tomlinson v. Land and Finance Corporation*, 14 Q. B. D. 539, decided that, "In an interpleader issue directed upon an application by a sheriff, who has received a notice of a claim to goods seized by him under a writ of *fi. fa.* in execution of a judgment, both the plaintiff and the defendant in the issue are really in the position of the plaintiff in an ordinary action, and therefore the defendant in the interpleader issue may be ordered to give security for costs in any case in which a plaintiff may be so ordered, and the rule, that a defendant cannot be compelled to give security for costs, does not apply."

It was under the provisions of the rule I have cited that the Court was enabled to come to that decision. Bowen, L. J., says, p. 542, speaking of this rule, "The hand of the Court is set free, and it may use its discretion whether security for costs should be ordered." The rule is not in force in Ontario. However, in our rules respecting garnish-

ment, rule 375 provides for the case of a claim by a third party to the debt sought to be garnished, and enacts that the Court or Judge may order any issue to be tried, and concludes in these words: "And may bar the claim of such third person, or may make such other order as such Court or Judge shall think fit, upon such terms, in all cases, with respect to the lien or charge (if any) of such third person and to costs, as the Court or Judge shall think just and reasonable."

This is quite as full and comprehensive for the present purpose as the new rule in England is as to an interpleader proceeding. I therefore think that it is open to me to make the order for security for costs in this garnishment proceeding against the claimant, because it is just and reasonable; though I could not make the order under the same circumstances, as to an interpleader issue.

I wish to make one further observation as to the case in 14 Q. B. D. 539. In that case the Court ordered security to be given by a limited company resident in the jurisdiction because it was insolvent—although it was enforcing its own debt, for its own benefit. Whoever is disposed to act on this part of the case, should consider the caution given by Lord Esher (p. 542), that the view adopted by the Court is not necessarily to be followed as a stringent rule in every case. I refer particularly to *Rhodes v. Dawson*, 16 Q. B. D. 548, and the cases there cited by Lindley, L. J., as explanatory of this part of the judgment, and very much qualifying it.

MCCARTHY V. COOPER ET AL.

Costs—Set-off—Rule 436—Solicitor's lien.

Under Rule 436 a discretion is allowed as to whether or not there shall be a set-off of costs in the same action where costs are awarded to and against the parties; equitable considerations are allowed to enter into the disposal of the contention, and there is no strict right in the matter.

A direction to set off costs was properly refused under the following circumstances:—The plaintiff succeeded at the trial of an action for specific performance of a contract for the sale of land, and was given costs up to the trial; on reference to a Master he failed to shew title, and was ordered to pay the defendant his costs subsequent to the trial, and to repay \$500 of the purchase money which had been paid by the defendant; the defendant's solicitor asserted a lien upon the sum due by the plaintiff for costs, which could be recovered upon the bond given by him as security for costs, whereas the \$500 could not be recovered against the plaintiff, who was worthless.

[April 25, 1887.—*Boyd, C.*]

AN appeal by the plaintiff from an order of the Master in Chambers refusing to direct a set-off *pro tanto* of the costs up to the trial awarded to the plaintiff to be paid by the defendant Cooper, and taxed at \$314, against the costs of the reference and hearing on further directions awarded to the defendant Cooper to be paid by the plaintiff, and taxed at \$78.

The action was brought to compel specific performance of a contract by the defendant Cooper to buy certain land from the plaintiff, and at the trial the judgment was in favour of the plaintiff; but, upon a reference to a Master, the plaintiff failed to shew a good title, and was ordered to pay the costs of the defendant Cooper subsequent to the trial, and to repay \$500 which had been paid by the defendant Cooper on account of the purchase money. The plaintiff lived out of the jurisdiction, and had given security for costs at the commencement of the action.

The plaintiff now desired to set off the \$78 costs payable by him against the \$314 costs payable by the defendant Cooper to him.

It was admitted that both the plaintiff and the defendant Cooper were worthless; but the defendant Cooper had his

remedy against the sureties on the bond for security for costs.

The solicitors for the defendant Cooper asserted a lien for costs which would prevent a set-off.

W. H. Blake, for the plaintiff, referred to Rule 436, O. J. A. ; *Marshall* on Costs, 2nd ed., 312 ; *Wilson v. Switzer*, 1 Ch. Chamb. R. 75, 160 ; *Brown v. Nelson*, 11 P. R. 121.

E. T. English, for the defendant Cooper, relied on *Dawson v. Moffatt*, 10 P. R. 366.

BOYD, C.—Whether the common law rule of T. T., 1856, No. 52, is in force or not it is in *pari materiâ* with Rule 436, as far as this application is concerned. By that I mean that both leave, as a matter resting in the sound discretion of the officer, the question whether or not there shall be a set-off of costs in the same action when costs are awarded to and against the parties. The words “may be deducted” and “may adjust by way of taxation” indicate that equitable considerations are allowed to enter into the disposal of the contention, and there is no strict right in the matter : *Edwards v. Hope*, 14 Q. B. D. 922 ; *Bennett v. Tregent*, 6 P. R. 171. Here the Master has exercised his discretion against allowing the set-off to the prejudice of the solicitors’ claim to be paid, and upon the circumstances of the case I am not disposed to interfere with what he has done. In the result, it appears that the action for specific performance should not have been brought, as the plaintiff has no title. The defendant has besides paid part of the price, \$500, to the plaintiff, which, it is said and not denied, cannot be recovered by process of execution. If the solicitor for the defendant has a claim against his client for services rendered in the Master’s office and on further directions to a greater extent than \$78, which is yet unpaid, there should be no set-off to the prejudice of the solicitor’s right to retain this \$78 when recovered from the sureties of the plaintiff. If there is to be a set-off, it appears to me more proper to set off the costs which the defendant

has to pay the plaintiff, *i. e.*, \$314, against the instalment of the price, \$500, which the plaintiff has to pay back to the defendant, and leave the defendant to recover the difference plus the costs taxed to him, \$78, against the plaintiff.

The appeal is dismissed, with costs.

TOWN OF PETERBOROUGH V. MIDLAND R. W. CO. AND GRAND
TRUNK R. W. CO.

Pleading—"Not guilty by statute"—Action for [specific performance of contract.

"Not guilty by statute" cannot be pleaded to an action for specific performance of a contract; and the defence of "not guilty" irrespective of statutory authority is not admissible under the Judicature Act.

[April 25, 1887.—*The Master in Chambers.*]

THIS was a motion by the plaintiffs to strike out the defence, which was "not guilty by statute."

The action was brought to compel the specific performance of certain undertakings of the defendants as to the maintenance of streets, &c., on the faith of which the plaintiffs had passed a by-law, &c., and of certain statutory conditions as to the state of the defendants' railway tracks, &c.

Watson, for the plaintiffs.

Aylesworth, for the defendants.

THE MASTER IN CHAMBERS.—In the statement of claim the defendants are charged on the breach of several contracts, and the plaintiffs seek the injunction of the Court to enforce performance of the contracts. There is no other cause of action, nor remedy sought.

I think, therefore, this is not a case where not guilty "by statute" can be pleaded. I am not aware of any authority for it.

Then, as to the plea of not guilty irrespective of statutory authority to plead it, it is not admissible under the Judicature Act; Cun. & Mat. 47-49; Rules 125 and 128, and the notes in *MacLennan's* Jud. Act, 2nd. ed., pp. 288-291. The pleadings now consist of statements of facts, not of legal results of facts: *Hammer v. Flight*, 35 L. T. N. S. 127.

But at any rate, even at common law, the plea is insensible where the claim is for a breach of contract merely.

I think the plea must be struck out.

WILLIAMSON V. TOWN OF AYLMER.

Taxing officer, powers of—Evidence—Solicitor—Retainer.

The taxing officers have the power to call for evidence on taxations pending before them.

Where the plaintiff was out of the jurisdiction, and a taxing officer had refused to proceed with the taxation of her costs of the action against the defendants until she was produced before him for examination, touching her retainer of the solicitor in whose name the proceedings in the action had been conducted, it was directed that the officer should first examine other witnesses, and then if unable to decide the question of retainer should report to a Judge in Chambers.

[April 1, 1887.—*Wilson, C. J.*]

NOTICE of motion was given on 1st March, 1887, that the plaintiff would apply in Chambers by way of appeal from the ruling of the taxing officer made on the 24th of February last, upon the return of an appointment for taxation, refusing to proceed with the taxation until the plaintiff was produced before him for examination.

The grounds of appeal were as follows:

1. That the plaintiff recovered a judgment against the defendants for \$500 with costs, and it was the duty of the taxing officer to tax such costs.

2. There is no obligation on the plaintiff's solicitor to produce the plaintiff for examination as a condition precedent to the taxation of the plaintiff's costs, and the taxing officer erred in so holding.

3. It was not shewn the plaintiff had done anything to disentitle her to her costs, and no sufficient grounds were shewn to warrant the taxing officer in adjourning the taxation until after the plaintiff should be produced for her examination touching her right to costs.

4. No appointment was issued by the taxing officer or any other person entitled to issue an appointment for the cross-examination of the plaintiff upon her affidavit filed on the 8th of February last, and no appointment could properly issue upon it for that purpose, as the application upon which it was made had been disposed of.

5. The plaintiff, residing in the County of Elgin, could not be compelled to be examined in Toronto before the taxing officer in Toronto under a subpoena and appointment.

An order made upon special application, upon notice to the plaintiff, would be required for that purpose.

And upon other grounds mentioned in the affidavits filed. And the plaintiff also asked for an order directing the taxing officer to proceed with the taxation, and for such other order as to the Judge might seem meet.

The appeal was argued on the 22nd March, 1887.

H. J. Scott, Q. C., for the plaintiff.

Aylesworth, for the defendants.

The facts appear in the judgment.

WILSON, C. J.—On the 28th of February the plaintiff's solicitors wrote to the agents of the defendants' solicitors that "the plaintiff is now in Briscoe, Illinois. If you desire to take her depositions we will consent to an order taking them there, or if you will pay her the proper witness fees and conduct money, she will be produced at St. Thomas for examination."

On the 18th of February, 1887, an order in Chambers was made by Armour, J., on notice and on hearing the parties, that the costs to which the plaintiff is entitled as between party and party, under her judgment against the defendants, be referred to S. B. Clark, one of the taxing officers, for taxation.

A subpoena was issued by the defendants' solicitor to serve upon the plaintiff to attend before the said taxing officer on the taxation of her costs so referred for taxation, but she had left this Province for Illinois about a week before the bailiff went to make the service of it upon her. It is said she had informed Mr. Tremear, a barrister in the town of Aylmer, about the 31st of January last, that she intended to take up her residence permanently at Briscoe, in the State of Illinois.

The plaintiff, by the copy of an affidavit not signed or sworn to [the original, if there be one, may be complete], says Mr. Charles Millar, of Toronto, is and has been her solicitor throughout this action; that she requested Mr. Stevens, of Aylmer, to have Mr. Millar, who was formerly of Aylmer, but is now of Toronto, to commence and carry on this action for her, and Mr. Stevens has informed her he had done so, and during the course of the action Stevens has on several occasions told her what Mr. Millar had told him to do for him, Millar, at Aylmer; that Mr. Millar has been her solicitor throughout the action, and she is liable to him for all the costs of the action.

Mr. Stevens says he is a barrister, practising at Aylmer, and he practises his profession in partnership with Mr. W. F. Morphy, a duly qualified solicitor, under the name of Stevens & Morphy, at Aylmer: that he and his firm acted as the agents of Mr. Millar in matters requiring attention in Aylmer, and also in advising the plaintiff during the progress of the action, and in filing and serving papers in the county of Elgin.

At an early stage in the cause he sent a statement of the facts of the case to Mr. Millar, who advised and directed the action and drew the pleadings. He knows Mr. Millar was the plaintiff's solicitor and directed the course of the action,—where it should be tried, and the important steps and proceedings therein,—and he knows the plaintiff is liable to him for the costs of the action.

The deputy-sheriff of the county of Elgin says in his affidavit of the 9th of October, 1886, that on the execution issued in this case the defendants paid \$500, sheriff's fees, and other incidentals, and he wrote to Mr. Millar, whose name was endorsed on the execution as having issued the same, stating the \$500 had been paid, and saying, "Will I send you the money, or will I send it to W. E. Stevens, of Aylmer, who appears to have been acting on your behalf?

* * Kindly advise me at once in the matter, and oblige ——." The sheriff said he had better retain \$41.50 claimed under a garnishee order, and in answer Mr. Millar

wrote to the sheriff: "You may send a cheque for \$500, payable to the plaintiff, or her order, to W. E. Stevens, Esq., barrister, Aylmer, for delivery to the plaintiff, less \$41.50, which you should retain as a protection to yourself until the garnishee summons is disposed of. No more of the moneys should be retained by you to answer that summons than are sufficient to satisfy it. A cheque for payment of the costs of the suit and execution, &c., kindly send to Mr. W. E. Stevens, payable to him, or to his order." And the deputy-sheriff said: "And the money was paid according to the instructions of said letter."

Mr. Haines, of the town of Aylmer, solicitor, a member of the firm of Crawford & Haines, the defendants' solicitors in this cause, says that the taxation of costs in this action has attracted a good deal of public attention. He is informed and believes that a cheque was sent by the sheriff to the plaintiff for \$500, less about \$74 garnished, payable to the order of the plaintiff, payable at a bank in St. Thomas; that the plaintiff endorsed the same to Mr. Stevens to collect it, and that he collected it and deducted the plaintiff's costs of the suit from the proceeds, and paid only the remainder to her, and in consequence of Stevens not paying her the whole amount that the plaintiff consulted Mr. Backhouse, a solicitor of Aylmer, as to the differences between the plaintiff and Mr. Stevens. He has seen and read a letter from Mr. Millar to Mr. Backhouse in relation to the said differences between the plaintiff and Mr. Stevens, and from such reading he recollects that Mr. Millar stated in such letter that he was not personally concerned in these money matters between the plaintiff and Mr. Stevens; that he has been informed by a gentleman of Aylmer, who did not wish his name mentioned, but who is of undoubted respectability and veracity, and he, the deponent, verily believes the plaintiff on several occasions told him the said Stevens brought the suit on his own risk as to costs, and if he did not recover the costs from the defendants she was not to pay him any costs, and that she also told him she did not employ Charles Millar in

the suit in any way, and that she had no claim against Millar, nor he against her in relation to this suit.

Mr. Stevens says in his affidavit of the 18th of March, 1887, that he received the cheque from the sheriff and collected it under the instructions of the plaintiff, and upon an arrangement between her and himself. He denies that the costs of the suit were deducted from the proceeds of the cheque, and says that the amount of the costs was not then and is not now known; and there has never been any arrangement or understanding between the plaintiff and himself, as Mr. Haines states, with respect to bringing the action and running the risk of the costs.

On the 4th of November, 1886, Mr. Millar wrote to the sheriff: "Any further moneys collected by you herein you are to hold subject to my order, and not deliver them to any person without an order from me."

The above affidavits and papers shew that the defendants desire to have the costs revised by the taxing officer, for the purpose of having the costs taxed upon entering judgment disallowed, upon the ground that the action was in fact brought and carried on by Mr. Stevens, a barrister, but not a solicitor of this Court, or by the partnership of Stevens and W. F. Morphy, a solicitor, and as I assume not a barrister; and that the name of Morphy and Millar as solicitors for the plaintiff was used in reality for the benefit of Mr. Stevens, or of his firm.

The defendants desire, for the purposes of the taxation to have the plaintiff present at the taxation, or that she should be in the country at any rate, in order to be examined by the defendants upon the matter in controversy—that is, to discover who it was she employed to bring the action, and all the facts and circumstances bearing upon that question.

And upon their application to the taxing officer to whom the bills have been referred by the Judge in Chambers for taxation, that officer has stayed the taxation "until after the plaintiff is produced by her solicitor for examination touching her right to costs. Until such examination I consider I have no right to tax the costs."

The motion on behalf of the plaintiff is to compel the taxation to be proceeded with according to the order of the Judge; and because also the taxing officer has no power to exercise such a power by staying proceedings until the plaintiff is produced for examination.

The chief question is:

Has the taxing officer the power to stay the proceedings on the taxation of a bill of costs until he has taken the evidence which, in his opinion, is necessary to enable him to make the taxation required?

The order he has made—assuming for the present that he may require the production of all reasonable and necessary evidence to enable him to proceed with and dispose of his work—may be in excess of his jurisdiction, or it may, if not beyond his jurisdiction, be an unreasonable exercise of it to stay the taxation he has been ordered to make “until the plaintiff’s solicitor shall produce the plaintiff for examination touching her right to costs;” the plaintiff being in a foreign country, and it being somewhat doubtful whether she may return or not, although it is partly suggested that she has been sent away to defeat this motion. This matter has been in controversy between the parties since the beginning of November at any rate. The application to refer the bill to taxation was made upon the 11th day of February, 1887, and the order referring the bill for taxation was made upon the 15th of the same month, and in the affidavit of Mr. White, who went to serve the plaintiff with an appointment to attend for the purpose of being examined, it is said that he was informed the plaintiff left for Illinois, where her sister resides, about a week before the 23rd of February. Then there are affidavits which shew she has left this Province to reside permanently in Illinois, and others which deny that. The circumstance of her leaving this country at the time when the order was made for a revision may have led the taxing officer to believe she had gone away to avoid being questioned or examined upon the subject.

It was said, and with much weight, that she had made an affidavit on the 8th of February, 1887, [which I have not seen] and that she was not, as she might have been, cross-examined upon that affidavit. It may have been the defendants thought a fuller and better examination could be had upon the revision, and that they had no reason to suppose the plaintiff would leave the country at a time when her rights were to be considered; and it appears she did consider she had such rights, if she took the advice of Mr. Backhouse, as it is said she did, as to the differences between herself and Mr. Stevens, about the money which she said Mr. Stevens had detained from her.

I cannot say the taxing officer, if he had the right to call for affidavits, or to require the production of parties before him for the purpose of an oral examination, exercised that power unreasonably. It is too doubtful on the affidavits to believe that the plaintiff has permanently left this country—there is reason to believe she will be back again in the course of the spring. It was not a reasonable offer on behalf of the solicitor of the plaintiff to bring her here at the expense of the defendants, and it was not a satisfactory offer to have her examined by deposition in the State of Illinois. Either course would be more costly than the whole amount in dispute, and besides there is some ground for supposing she went away at a time when it is hard to believe it could have been for any other purpose than to avoid the examination which the defendants were anxious to procure. That the taxing officer has the power to call for evidence in matters before him is, and has been, the practice in the Courts as a part of his necessary jurisdiction. He is the mere officer of the Court in settling the question of the costs—the award of costs, speaking generally, is the act of the Court. Rule 438 shews the taxing officer has power to administer oaths for the purpose of any proceeding before him, to examine witnesses, directing the production of books, and requiring any party to be represented by a solicitor, and other extensive powers specified.

In taxing costs to be borne by a fund or estate, under rule 440, he may direct what parties are to attend before him, and to disallow the costs of any party whose attendance he considers unnecessary: as to his other powers, see rules 441, 442, 445. By rule 448 he may re-consider and review his own taxation, and he may, if he shall think fit, receive further evidence in respect thereof. See also rule 449, and the notes to the same in *Langton's Maclellan's Judicature Act*, p. 549, and rules 450, 544, under which the Judge or Master in Chambers may hear and determine an application to review the taxing officer's taxation, "upon the evidence which shall have been brought in before the taxing officer, and no further evidence shall be received upon the hearing thereof, unless the Judge (or Master) shall otherwise direct."

And by rule 598 a witness may be subpoenaed to attend before the Court, or any officer having jurisdiction in the county where the witness resides, for the purpose of using his evidence upon any motion or other proceeding before the Court or any Judge or judicial officer in Chambers.

The taxing officer may therefore, by long usage, the rules of Court, and legislative enactment, take and call for evidence in matters which come before him. And it is an old established practice that the Master of the Crown office, or other officer in other Courts performing the like duties, is the officer to whom is referred the examination upon interrogatories of any one charged in contempt, and the important question also whether upon such examination contempt has been committed or not, which he is to report to the Court.

It is a question with me whether in this case, as the party summoned to appear is out of the country, the officer should not have reported to the Judge that he could not, in his opinion, satisfactorily review the taxation, by reason of the plaintiff, whose evidence was material upon the reference, being out of the jurisdiction of this Court and any other matters why the revision should be stayed until she returned to this country: such as his reason to

believe her absence was not of a permanent nature, and that it was suggested she was absent to avoid a personal examination or the like, in place of staying the taxation as he has done.

If the officer had proceeded with the taxation, this would probably have happened: the first item, "instructions," would have been called in question: the whole objection to the bill would probably have been tried upon that one item. The plaintiff must have proved that the instructions were in fact given to, or on behalf, or for the benefit of Mr. Millar, and not to Mr. Stevens. The officer would have to settle that question before he could proceed, or reserve it and go on with the taxation. There may be no other question to be settled than that which arises upon the very first item of "instructions"—for the exception is not to the quantum, but to the principle of the whole bill. The officer has therefore in effect either to allow all or nothing; and what is he to do if he is bound to proceed upon what, in his opinion, is imperfect evidence to enable him fully to review the taxation intelligently? He is not bound to allow any part of the bill, because he is ordered to review the taxation: *Simmons v. Storer*, 14 Ch. D. 154.

If he is not satisfied with the present evidence he has now before him, he should, I think, call Mr. Millar, Mr. Stevens, and any others he may think necessary for the purpose, to appear before him and submit to examination; and if upon that evidence he is enabled to decide the question of retainer, he will proceed with the revision, if not, he may then report the whole matter to the Judge in Chambers. I make no other disposition of the case before me, and the question of the costs of this motion I reserve.

I refer to the following cases: *The Neera*, 5 P. D. 118; *Hargreaves v. Scott*, 4 C. P. D. 21; *Metropolitan Asylum District v. Hill*, 5 App. Cas. 582; *Wilmott v. Barber*, 17 Ch. D. 772; *Marsden v. Lancashire, &c., R.W. Co.*, 7 Q. B. D. 641; *Re Rio Grande Do Sul S. S. Co.*, 5 Ch. D. 282; *The City of Manchester*, 5 P. D. 221; *Re Bradford*, 15 Q. B. D. 635; *Prebble v. Boghurst*, 1 R. & My. 744; *Coates v. Haukyard*, *ib.* 746.

APPLEMAN V. APPLEMAN.

Will—Pleading—Counter-claim—Fraud—Particulars.

The defendant contested the validity of a will propounded by the plaintiff, and also propounded two earlier wills, under which, in the event of the last in date being invalidated, he claimed.

Hell, that this was a proper subject of counter-claim.

Hell, also, that a general defence of fraud was admissible in such a case; but under that defence the defendant was required to give particulars immediately after the examination of the plaintiff.

[May 25, 1887.—*Boyd*, C.]

MOTION by the plaintiff to strike out the 6th, 7th, and 8th paragraphs, and for particulars under the 3rd paragraph, of the statement of defence.

The cause was transferred by order from a Surrogate Court to the Chancery Division of the High Court, and this motion, which was pending at the time of transfer, was referred by the Judge of the Surrogate Court.

F. W. Hill, for the plaintiff.

F. E. Hodgins, for the defendant.

BOYD, C.—The defendant contests the validity of the will propounded by the plaintiff dated 8th January, 1886, on various grounds, and also propounds two earlier wills of the testator, which, in the event of the last in date being invalidated, he claims under. This appears to be now a proper matter of counter-claim, having regard to the practice which existed before the Judicature Act: *Parton v. Johnson*, 1 P. & D. 549. I do not therefore strike out these statements in the defence.

As to the general plea of fraud, the defendant says that he can only procure the particulars from the examination of the plaintiff. It is not unusual to plead generally in such a case: *Browne v. Thomas*, 1 Spinks Ec. & Ad. 31; but upon and forthwith after the plaintiff's examination the defendant should formulate and serve the particulars of the acts of fraud on which he intends to rely; in default of which he will be debarred from giving evidence on that issue. Costs of this application to be costs in the cause.

LANGDON V. ROBERTSON.

Leave to appeal—Time.

Where leave of the Court is necessary for an appeal, application therefor should be made within three months from the judgment to be appealed from; but in a case where, although leave to appeal was necessary, none was obtained, and the appellant gave notice and filed his appeal bond, which was allowed without objection by the respondent, and where the appeal presented a fairly arguable question of law, and no sittings had been lost by the delay;

Held, that such an equity was raised in the appellant's favor as entitled him to relief after the three months.

The rule laid down in *Sierewright v. Leys*, 9 P. R. 200, is the rule that should be acted upon in regard to extension of time.

Upon an interlocutory application the Court will not hear more than one counsel for any party.

[May 11, 1887.—*The Court of Appeal.*]

MOTION by the plaintiff for leave to appeal from the judgment of the Common Pleas Division (13 O. R. 497).

It appeared that notice of appeal had been given, and a bond filed by the appellant and allowed without objection on the part of the respondent, within the three months allowed by statute, and that the appeal was being proceeded with in the ordinary course, when immediately after the expiry of the three months a motion was made by the respondent to quash the appeal, on the ground that no leave to appeal had been obtained. The appellant's solicitor had been under the erroneous impression that an appeal lay without leave. The motion to quash was enlarged to allow this application to be made.

J. L. Murphy, for the appellant, now supported the motion for leave to appeal.

Middleton asked to be heard on the same side.

THE COURT declined to hear a second counsel, holding that on an interlocutory application only one counsel could be heard.

MacKelcan, Q. C., shewed cause. This application should have been made within three months from the delivery of judgment, as although there is no express statutory limi-

tation of the time within which the application must be made, the security is to be given within three months. Nothing is shewn to excuse the delay, and the Court cannot extend the time now.

THE COURT granted the leave to appeal, holding that, although in ordinary cases leave should be applied for within three months from the judgment, yet as the security had been perfected without opposition or objection on the part of the respondent, such an equity was raised in the appellant's favour as entitled him to the relief asked; a fairly arguable question of law being presented by the appeal, and no sittings of the Court having been actually lost by the delay.

The Court considered that the rule laid down in *Siewright v. Leys*, 9 P. R. 200, was the proper rule to be acted upon in regard to extension of time.

RE MONTAGUE AND THE TOWNSHIP OF ALDBOROUGH.

Costs—County Court scale—Counsel fees—Arbitration.

In taxing the costs of an arbitration upon the County Court scale, no larger fee for attendance of counsel before the arbitrators than \$25 can be allowed, even though the attendance is for several days.

[May 6, 1887.—*Wilson, C. J.*]

AN arbitration under the Municipal Act. Montague obtained an award for \$100 for damages to his land, caused by the improper construction of a drain, and the award ordered the township of Aldborough to pay his costs upon the County Court scale.

The taxing officer at St. Thomas allowed on the taxation a counsel fee for each of the six days during which the arbitration lasted, the amount being in all \$130. On revision before S. B. Clark, Esq., one of the taxing officers at Toronto, counsel fees were allowed in the same manner, but the total amount was reduced to \$100. Mr. Clark ruled that the practice heretofore pursued in his office of calculating the counsel fees as if they had been allowed on the scale of the High Court of Justice, and then taxing one half of that amount as counsel fees upon the County Court scale, should be followed.

The Township of Aldborough appeal from his ruling.

F. E. Hodgins, for the appeal.

C. J. Holman, contra.

WILSON, C. J., held that under items 144 and 152 of the County Court tariff of 1st January, 1885, the maximum counsel fee which could be allowed when costs were to be taxed upon the County Court scale was \$25, and therefore allowed the appeal and reduced the counsel fees to \$25.

REGINA V. HALL.

Canada Temperance Act—Conviction—Adjournment to consider of judgment—32 & 33 Vic. ch. 31, sec. 46—Evidence—Certiorari.

Upon an information for an offence against the Canada Temperance Act a police magistrate heard all the evidence within the proper time, and at the close of the evidence announced in presence of the parties that judgment would be reserved for two weeks from that day—at which appointed time judgment was duly pronounced.

Held, that 32 & 33 Vic. ch. 31, sec. 46 (D.), which is to be read into the Canada Temperance Act by virtue of sec. 107, applies only to an adjournment of the hearing or the further hearing of the information or complaint, which is quite a distinct thing from the adjudication or determination of the charge after the hearing is completed. Justices are not obliged to fix the fine or punishment at the instant of conviction, but may take time either for the purpose of informing themselves as to the legal penalty or the amount proper to be imposed, or taking advice as to the law applicable to the case.

Notwithstanding the adjournment after the close of the hearing for fourteen days in order to consider of and give judgment, the police magistrate had jurisdiction, and the conduct of the proceedings was not even irregular.

Regina v. French, 13 O. R. 80, distinguished.

There was an amendment of the original information by changing the date of the offence from the 10th to the 23rd of February, and the parties agreed that the evidence taken should stand for the purposes of the amended charge instead of having a needless repetition of it.

Held, that this course was unobjectionable.

The defendant's application for a *certiorari* was refused, with costs.

[April 22, 1887.—*Boyd, C.*]

[May 19, 1887.—*The Queen's Bench Division.*]

AN application for a *certiorari* to remove a conviction by a police magistrate for an offence against the Canada Temperance Act. The facts appear in the judgment.

Walter Read, for the defendant.

Aylesworth, for the magistrate.

BOYD, C.—This is an application for a *certiorari* to remove a conviction by a police magistrate under the Canada Temperance Act, grounded on materials which, it is said, disclose three objections to his course of procedure. Assuming that each of the points complained of would warrant the application, notwithstanding the section which takes away the *certiorari*, (sec. 111 of 41 Vic. ch. 16 (D.)), yet, in my opinion, none of them is entitled to prevail.

That which was mainly relied on was that the magistrate had discharged himself and become *functus officio* by adjourning for a longer period than a week, contrary to 32 & 33 Vic. ch. 31, sec. 46 (D.), which is to be read into the Canada Temperance Act by virtue of the 107th section thereof. This section 46 imposes for the first time a limitation on the power of adjournment which is not found in the earlier Acts, (*i. e.*, the Jervis Act, 11 & 12 Vic. ch. 43, sec. 16, yet in force in England, which is the original of the Canadian, to be found in Consolidated Statutes Canada, ch. 103, sec. 46.) The limitation is that "no such adjournment shall be for more than one week." But for this, there is inherent power by common law for the magistrate to adjourn. That was pointedly stated in a case of the same summary character as this by the Irish Queen's Bench in *Regina v. Clonmel*, 9 Ir. C. L. Rep. 267. The interpretation then of this limitation is to be had in view of the previous state of law, so as not to make it mean more than it says. Section 46 applies only to an adjournment of the hearing or the further hearing of the information or complaint. This is quite a distinct thing from the adjudication or determination of the charge after the hearing is completed. In this case the magistrate heard all the evidence within the proper time, and at the close of the evidence he announced in presence of the parties that judgment would be reserved for two weeks from that day—at which appointed time judgment was duly pronounced. Sec. 41 of 32 & 33 Vic. (D.), marks this distinction between the hearing and the determination of the case, as does also sec. 106 of the Canada Temperance Act. The text books all recognize the law to be that the justices are not obliged to fix the fine or punishment at the instant of conviction, but may take time either for the purpose of informing themselves as to the legal penalty, or the amount proper to be imposed, or taking advice as to the law applicable to the case: *Stone's Justices' Manual*, 23rd ed., p. 640, and 30th ed. of *Burn's Justice*, vol. 1, p. 1142. No authority is referred to, but, if needed, a very venerable and weighty utterance on

the point may be found in *Rex v. Elwell*, 2 Lord Raym. 1514, where all the Judges held that the magistrates need not *eo instanti* set the fine, but might adjourn for a little time to consider of the fine. They held also that if a *certiorari* came to the justices, they might proceed to set a fine and complete their judgment, and it would be no contempt. The decision cited for the defendant of *Regina v. French*, 13 O. R. 80, is upon the effect of adjourning more than seven days pending the hearing: a somewhat contrary view of the effect of that section is taken by Thompson, J., in *Messenger v. Parker*, 6 Russ. & Geld. 237, but it is not needful to dwell further on this matter for the purposes of the present application. Notwithstanding the adjournment after the close of the hearing for fourteen days, in order to consider of and give judgment, I think the police magistrate had jurisdiction, and his conduct of the proceedings was not even irregular.

Another objection is based on a misapprehension of the facts and the course of the trial. There was an amendment of the original information, (changing the date of the offence from the 10th to the 23rd February), but it was proper to do this under sec. 116 of the Temperance Act. Thereupon the parties agreed that the evidence taken should stand for the purposes of the amended charge, instead of having a needless repetition of it. Against this nothing can be objected.

It was further argued that there was improper evidence taken under sec. 119 of the Canada Temperance Act, and *Regina v. Walker*, 13 O. R. 83, was cited. It seems to me that the magistrate may take such general evidence as he did, under the ruling of Wilson, C. J., in *Regina v. Brady*, 12 O. R. 358, and *Regina v. Sanderson*, *ib.* 178; but apart from the general evidence, there was in this case particular proof of the sale of beer of an intoxicating character (disguised under the name of "pop") to a man called Fenn.

The application for *certiorari* is refused, with costs.

An appeal was brought on before the Queen's Bench Divisional Court on the 19th May, 1887, and was argued by the same counsel.

The appeal was dismissed, with costs.

WAGHORN V. HAWKINS.

Order made at trial, how signed—Divisions of High Court.

Where an action in the Queen's Bench or Common Pleas Division of the High Court of Justice is, under Rule 590, set down for trial at a sittings for trial of actions in the Chancery Division, any order made in such action by the Judge presiding at such sittings should be signed by the officer who acts as registrar at such sittings, and not by the registrar of the Division to which the action belongs.

[May 18, 1887.—*The Common Pleas Division.*]

AN application by the plaintiff for a direction to the registrar of the Common Pleas Division to sign an order.

J. M. Clark, for the plaintiff.

CAMERON, C. J.—This action was commenced in this Division of the High Court, and brought on for trial at the last sittings of the Chancery Division at Toronto, before Mr. Justice Proudfoot, who ordered that the same should be postponed on terms till the next sittings. The learned Judge did not sign the order, and on application to Mr. McLean, the assistant-registrar of the Chancery Division, acting as such at the time the Judge's order was made, he declined to sign the order, on the alleged ground that he was not an officer of the Common Pleas Division, and was therefore not the proper officer to sign such order. Application was then made to the registrar of this Court to sign the order, and he declined to do so, as he was not at the trial, and not an officer of the Court at which the order was made.

Mr. Clark, for the plaintiff, has moved for the direction of this Court to Mr. Jackson, the registrar of this Division

of the High Court, contending that it is his duty to sign such order; and he has referred to the following clauses of the Judicature Act and Rules, and Orders of the Court of Chancery, in support of his application: sec. 25, sub-sec. 2; sec. 58; Rules 274, 275; and Chancery Orders 8 and 630, pp. 5 and 360 of *Holmested's R. & O.*

Sec. 25 provides, subject to any rules of Court, and the provisions of the Act, every cause or matter commenced in the High Court of Justice shall be assigned to one of the Divisions of the said High Court. Sub-sec. 2 requires all interlocutory and other steps and proceedings in or before the said High Court, in any cause or matter subsequent to the commencement thereof, shall be taken (subject to any rules of Court, and the power to transfer,) in the Division of the said High Court to which such cause or matter is for the time being attached. Sec. 58 continues the officers of the former Courts of Chancery, Queen's Bench, and Common Pleas, as officers of the Divisions of the Court bearing the same name as the former Courts. By order 8 of the Chancery Rules and Orders, all orders made in open Court, or to be issued on *præcipe* for foreclosure on the application of an incumbrancer, are to be drawn up, settled, and passed by the *registrar*; and by order 630, the registrar and assistant-registrar shall sign all orders and decrees issued by them respectively; and in respect to such orders and decrees, shall discharge all the duties, and possess all the powers which are, under general orders 8 to 13, both inclusive, and order 596, discharged or possessed by the registrar.

These rules and orders were made previous to the making of rule 590 under the Judicature Act, and before which order this case could not, except on formal transfer to that Division, have been tried in the Chancery Division, having been commenced in the Common Pleas Division. By this rule 590 any action in either of the Common Law Divisions, which does not require to be tried by a jury, may be tried at the Chancery Sittings. And it appears to me the officer who acts as registrar or deputy registrar

thereat must sign the order made at that Court. The Judge sitting at the trial is the High Court, and the officer of the Court verifies the judgment or decree of that Court, on which the Divisional Court, or more properly speaking, the officers of the Divisional Court, in which the subsequent proceedings must be taken, act. By Rule 415 of the Judicature Act, all officers are auxiliary to one another for promoting the correct, convenient, and speedy administration of business. It would be most inconvenient to require an order made in the Chancery Division to be signed by an officer of one of the Common Law Divisions when he was not present and sitting in Court to hear and know what the order of the Court is, and must therefore in the absence of the Judge's signature, verifying his own order, rely upon information derived from the officer of the Court, who has registered the Judge's decree, judgment, or order. Then by Rules 274 and 275, the registrar, clerk of assize, or other officer present at the trial, is required to enter all such findings as the Judge may at the trial direct to be entered, and the directions, if any, of the Judge as to judgment, and the certificates, if any, granted by the Judge—such entry to be made in a book to be kept for the purpose, and also to be endorsed on the copy of the pleadings delivered under Rule 9. The endorsement or certificate of the officer or Judge shall be a sufficient authority to the proper officer for entering judgment to enter judgment accordingly. The endorsement or certificate, as I understand it, is in place of the old *postea*.

The rules do not expressly provide for a case like the present. Were it not for Rule 590, permitting the trial of this case at the Chancery Sittings, and the fact of the trial taking place in Toronto, the difficulty would not have arisen—for by Rule 417, where the offices of Deputy Clerk of the Crown, and Deputy Registrar in any County are not held by the same person, each has his own powers and the powers of the other also.

I am quite sure when Rule 590 was passed by the Supreme Court, it was not in the contemplation of its

framers that an officer of this Division should attend the sittings of the Chancery Division to record in the book kept for that purpose, or on the pleadings, the order and direction of the Court, or that the officer acting as the registrar of that Court would not, in respect to any order or direction made by the Judge at the trial, have exactly the same power and duty in respect to such order or direction as the officer discharging the same duty in the Common Law Divisions. While it is most desirable that no officer should usurp an authority or power, it is equally desirable that no unnecessary impediment should be opposed to the order or judgment of the Court being given effect to with the least possible delay under the circumstances, and without the intervention of an unnecessary number of officers. It would in the present case seem to be an unnecessary multiplication of officers to require Mr. McLean, the assistant-registrar of the Chancery Division, to sign a certificate on which the registrar of this Division should sign an order to give effect to the judgment of the Court of which Mr. McLean was, at the time judgment was pronounced, the proper officer to have signed such order, if the case had originated in the Chancery Division. The process of this Division, wherever necessary, would be issued to enforce the judgment or decree of the Judge trying the case in the Chancery Division under Rule 590; and it does not strike me that such process, if in accordance with the judgment pronounced, could be set aside on the ground that Mr. McLean was not the proper officer to sign the order the Judge had directed to be issued. I do not entertain any doubt that Mr. McLean, the assistant-registrar, was the proper person to endorse on the pleadings the order of postponement made by the Judge at the trial, and such endorsement would be acted upon by the officers of this Division without any more formal or other order. The application, therefore, for a direction to Mr. Jackson, the registrar, to sign the order must be refused.

GALT and ROSE, JJ., concurred.

Motion refused.

MACKAY ET AL. V. MACFARLANE.

Action begun without authority—Dismissal—Costs—Procedure after judgment—Creditors.

An action was brought on behalf of the plaintiffs and all other creditors of V. to obtain from the defendant, the assignee of V. for the benefit of creditors, an account of all moneys received by him from the estate of V., and for payment of what might be found due. Judgment was pronounced in favour of the plaintiffs, directing a reference to take the accounts and reserving further directions and costs. The judgment was not issued, and after it was pronounced the defendant and the plaintiffs' solicitor both died. The executrix of the defendant obtained from a local Judge a summons to compel the plaintiffs to revive the action, or to dismiss it with costs. On the return of the summons counsel for the plaintiffs stated that they would consent to an order dismissing the action without costs, but if that were not agreed to, that they desired an enlargement to shew that the plaintiffs had never authorized the bringing of the action and that they had no knowledge of it until the service upon them of the summons now in question. The local Judge, however, made an order dismissing the action with costs. *Held*, on appeal, that the local Judge would have been justified in dismissing the action without costs if it had been shewn to him that it was brought without the authority of the plaintiffs, and that he should have granted an enlargement for that purpose, and if he had after the enlargement been satisfied of the truth of the plaintiffs' statements, he should have discharged the summons; for a party should not be required against his will to continue in his name an action which he never authorized to be begun.

The old Chancery rule that an action can be dismissed, on the application of a plaintiff who has not authorized his name to be used, only on payment of costs, is not now in force, but the plaintiff is now entitled to an order to stay the proceedings without payment of costs.

Reynolds v. Howell, L. R. 8 Q. B. 398, and *Nurse v. Durnford*, 13 Ch. D. 764, followed.

Held, also, that an action of this kind should not have been dismissed after judgment pronounced, for the creditors other than the plaintiffs should not have been deprived of the benefit of the judgment.

[June 7, 1887.—*Robertson, J.*]

THIS was an appeal by the plaintiffs from an order of the local Judge of the High Court of Justice at Cornwall, made on the 30th March, 1887, dismissing the action.

The action was brought by the plaintiffs on behalf of themselves and all other creditors of H. Vineborg & Bros., against the defendant, who was assignee of these parties, under an assignment for the benefit of creditors, for an account of all moneys received by him from the estate of the assignors, and for an order for payment of

what might be found to be due, &c. On the 3rd November, 1885, the action was tried before Mr. Justice Ferguson, and judgment was given in favour of the plaintiffs, with a reference to the Master at Cornwall to take the accounts; further directions and all costs, &c., were reserved until after report. The judgment was not taken out, and since the rendering of it the defendant departed this life, having first made and published his last will and testament, of which he appointed Isabella M. Macfarlane executrix, who proved the will and issued probate.

On the 24th March, 1887, a summons on behalf of the executrix was granted, returnable before the local Judge, requiring the parties to attend "for an order to compel the above named plaintiffs to revive this action within ten days from the date of the said order, in the name of Isabella Mowat Macfarlane, administratrix of the last will and testament of Robert M. Macfarlane, or in default thereof that this action be dismissed with costs, or for an order dismissing this action with costs, for want of prosecution." On the return of this summons counsel for the plaintiffs appeared and informed the local Judge that the plaintiffs would not object to the action being dismissed without costs, but if the applicant would not agree to this, that the plaintiffs wished an enlargement for the purpose of shewing upon affidavits that the plaintiffs had never authorized the bringing of the action, &c., and that they never had any knowledge of its having been brought until service of the summons in question. The learned local Judge refused to enlarge, holding that it did not make any difference whether it were shewn or not that plaintiffs had not authorized the bringing of the action; that the proper thing to be done was to dismiss the action with costs, and the plaintiffs could seek their remedy against the solicitor who had instituted proceedings in their name unauthorized, &c. The local Judge afterwards made the order which was now appealed against. It was in these words: "Upon the application of Isabella M.

Macfarlane, the executrix of the last will and testament of Robert Macfarlane, and upon reading the affidavit of James Leitch, and hearing counsel for plaintiffs and Isabella M. Macfarlane, it is ordered that this action be, and the same is hereby dismissed out of this Honourable Court with costs, to be paid by the plaintiffs to Isabella M. Macfarlane forthwith after taxation."

A. H. Marsh, for the appellants.

D. W. Saunders, for the respondent.

The cases and authorities cited are referred to in the judgment.

ROBERTSON J.—The appellants contend, first, that the learned local Judge was in error in holding that he could not dismiss the action without costs, on the ground that the plaintiffs had never authorized their names to be used as plaintiffs in bringing it; and, in my judgment, that contention is correct. In *Newbiggin-by-the-Sea Gas Co. v. Armstrong*, 13 Ch. D. 310, it was held that where a solicitor had commenced an action in the name of a plaintiff without authority, the proper course was for the plaintiff to serve notice of motion on the defendant, as well as on the solicitor, that the action might be dismissed, and that the solicitor might be ordered to pay the costs of the plaintiff as between solicitor and client, and the costs of the defendant as between party and party.

In this action, however, the plaintiffs were and are very awkwardly placed; the solicitor who brought the action had died before this application was made, and so had the defendant. The plaintiffs knew nothing of their being plaintiffs until the service of the summons to appear before the local Judge. They could not then give notice to the defendant, because he was dead. Nor could they give notice to the solicitor, for the same reason; and it was not until the return of the summons that they could make their position known. They could not even apply to

revive the action after the death of the defendant, had they been aware that this action was pending, for the reason that such a step would fix them with all the responsibility of bringing the action. I think, therefore, the learned local Judge should have given the plaintiffs an opportunity of showing that they had not authorized the action being brought, and if they satisfied him on that point, then I think his proper course would have been to have refused the application of the executrix. It seems absurd that a party should be required against his will to continue in his name what he had never authorized to have been begun. In *Nurse v. Durnford*, 13 Ch. D. 764, it was held that the name of a plaintiff having been inserted on the record without his knowledge, consent, or authority, on motion by the defendants to dismiss for want of prosecution, and on motion by the plaintiff to have his name struck out from the record, that the solicitors to the record who had purported to act for the plaintiff were liable to pay his costs of the motion as between solicitor and client, and also to pay the costs of the defendants of the action and all the motions therein.

The learned local Judge seems to have thought that the old rule which allowed an action to be dismissed, on the application of a plaintiff who had not authorized his name to be used, only on payment of costs, was still in force; but since the Judicature Act in England that practice has been departed from, and as far back as 1873 the Queen's Bench Divisional Court held that the plaintiff is entitled to have the proceedings stayed without payment of costs. Blackburn, J., in giving judgment in the case referred to, L. R. 8 Q. B., says, at p. 400: "In this case, as the action was brought without authority, on the authority of *Robson v. Eaton*, 1 T. R. 62, the plaintiffs are entitled to have the action stayed, and without payment of costs. I may add that, in my opinion, if a plaintiff after action brought in his name by an attorney without authority, hears of it, and does not repudiate it, he will be supposed to have ratified the attorney's act;" and this practice was afterwards approved of and

followed in the Chancery Division, in *Nurse v. Durnford*, in 1879, before cited, in which Jessel, M. R., says in his judgment, at p. 678: "The rule adopted by the Common Law Courts, as laid down in *Reynolds v. Howell*, L. R. 8 Q. B. 398, (the case from which I have made the foregoing extracts) appears to have been that when an attorney brought an action in the name of a plaintiff without his authority the plaintiff was entitled to an order to stay the proceedings without payment of costs. That seems to me to be the more sensible practice, and one more in accordance with the law relating to principal and agent, than to leave the plaintiff to his own remedy against the solicitor who has improperly joined him as plaintiff. I shall, therefore, adopt the Common Law rule, and as Messrs. G. L. P. Eyre & Co. have acted without sufficient authority in making Mr. Walker co-plaintiff, they must pay the costs."

It appears to me there is another reason, however, why this action should not have been dismissed on the application complained of: and it is this; the action is brought on behalf of other creditors, as well as of the plaintiffs; and although there is no doubt the plaintiffs retain full control and absolute dominion of the suit until decree, and may dismiss the action at their pleasure at any time previous to that; after decree they cannot deprive the other persons of the same class of the benefit of the decree or judgment, if they think fit to prosecute; *Handford v. Storie*, 2 Sim. & Stuart, 196. So that had there been no difficulty in the way by reason of no authority to use the plaintiffs' names, the other creditors should have received notice before the action was dismissed, and here is where it is manifest the order is wrong as made.

The most that should have been done was to have made an order requiring plaintiffs to revive the action within a limited time in the name of the executrix of the deceased defendant, or in default thereof that the action be dismissed; but instead of this, on the application of a person who is not a party to the action, it is dismissed, with costs to be paid to the applicant.

Mr. Saunders, for the respondent herein, however, contends, on the authority of *Barton v. Barton*, 3 K. & J. 512, that after a decree merely directing accounts and enquiries, as was the fact here, an action can always be dismissed. On reference to that case, however, it will be found that the decree having been made under a misapprehension, and upon a further consideration so found, the action was dismissed; but that is not this case. And I think the case of *Bluck v. Colnaghi*, 9 Sim. 411, cited by Mr. Marsh, is authority for holding the other way.

Taking the whole facts into consideration, I think the order appealed against was made in error, and should not be allowed to stand. I cannot find any authority for upholding it, and I, therefore, allow the appeal, with costs.

MILLAR V. CLINE.

RE MILLAR, A SOLICITOR.

Solicitor and client—Order for taxation—Taxing officer, powers of—Order for payment over.

Under the common order for taxation of a solicitor's bill of costs, Form 136, O. J. A., a taxing officer has power to investigate and dispose of questions of carelessness, impropriety, and negligence in the conduct of the business to which the bill relates; and the officer's certificate is conclusive as to all matters within his jurisdiction.

Where therefore after action brought upon a bill of costs there has been a taxation under such an order, there is an end to litigation, and it only remains to enforce payment of what has been found due, which may be done upon a subsequent application by the solicitor.

The original order for taxation may reserve questions of retainer and negligence in a proper case, but if it does not the client should not be allowed a double chance of defeating the solicitor's claim, by proceeding to defend the action after the conclusion of the taxation.

Re Clark, 9 P. R. 337, and *Macdonald v. Piper*, 10 P. R. 586, distinguished.

[June 7, 1887.—*Boyd*, C.]

A motion to a Judge in Chambers for an order for payment to a solicitor by his client of the amount found by the taxing officer to be due.

The order referring the bill of costs to the officer for taxation was made, at the instance of the client, by the Master in Chambers after an action upon the bill had been begun, but before the writ was served upon the client, and was entitled in the style of the action as well as in the matter of the solicitor. The order was in the form No. 136, O. J. A., no leave to dispute the retainer being reserved.

The client, in answer to the motion for payment, filed an affidavit saying that she wished to set up as a defence to the action that the solicitor had been guilty of negligence in his conduct of some of the proceedings to which the bill related.

It did not appear whether or not the question of negligence had been raised in the taxing office.

Dewart, for the client. The practice in *Re Bacon*, 3 Ch. Chamb. R. 79, does not apply here, for an action has been begun. The reference to the taxing officer was simply to ascertain the amount due, other matters in question being left to be litigated in the ordinary way: Rule 443, O. J. A.; *Re Clark*, 9 P. R. 337; *Macdonald v. Piper*, 10 P. R. 586. The order did not contain a direction for payment over after taxation, as did the common order in Chancery before the Judicature Act, and there is no practice to warrant such a direction being made after the taxation.

Hoyles, for the solicitor. A certificate of taxation is a report: *Exchange Bank v. Newell*, 9 P. R. 528; *Re Ponton*, 15 Gr. 355; and after confirmation is conclusive as to all the questions over which the taxing officer has jurisdiction. The defence of negligence can and should be disposed of on the taxation: *Re Hardy*, 3 Ch. Chamb. R. 179. The client herself obtained the order to tax, and having thus elected to bring the matter before the proper tribunal, should not now be allowed to take it before a jury. The defence of negligence has either been set up in the taxing office, and has failed, or might have been set up and has not. The Court of Chancery always had jurisdiction to order payment, and that jurisdiction has been specially preserved to the High Court by Rule 445, O. J. A. A summary order can be made for a solicitor to pay over an amount found due after taxation, and the solicitor should have a similar remedy against the client. *Re Elliot*, 18 C. L. J. 75; 2 C. L. T. 104; *Re A. B.*, 8 P. R. 126; and *Re Peace and Waller*, 49 L. T. N. S. 637, were also referred to.

BOYD, C.—The retainer not being disputed, the order obtained by the client in this case was the common order for taxation. That follows the form given in the appendix to the Judicature Act, No. 136, which with the matters incorporated therewith by Rule 443 is precisely in the official form prescribed upon the client's application under the English Judicature Act: *Archibald's Prac. in Chambers*, 2nd ed., p. 330. Under this order the taxing master has

power to investigate and dispose of questions of carelessness, impropriety, and negligence such as are complained of in the client's affidavit: *Re Massey*, 26 Ch. D. 459; *Re Hardy*, 3 Ch. Chamb. R. 179; *Thomson v. Milliken*, 13 Gr. 104, 15 Gr. 197. This being so, the certificate or allocatur is "*final and conclusive*" by the terms of the statute as to all matters within the officer's jurisdiction: R. S. O. ch. 140, sec. 49; see also Rule 449, to the same effect. In other words, such a taxation is an end of litigation, and it only remains to enforce payment of what is due. That appears to me to be reasonable in principle, and to be well founded in case of law. In *Re Lowless*, 6 C. B. 123, the client obtained an order to tax without prejudice to his right to dispute the retainer. There was no undertaking on the part of the client, nor any order upon him to pay what should be found due. At the request of both parties, the Master decided the question of retainer, against the client, and it was held that the attorney was entitled to judgment for the sum due, under the special clause of the English Act not in force here. But our statute, sec. 49, already cited, is the same as the English Act, under which another method of relief, more simple and direct, was procurable. That is by means of a subsequent application to pay what is found to be due upon the taxation. Such was the course pointed out by Erle, J., in *Re Woodhouse*, 2 C. B. 290, and sanctioned as proper practice by the House of Lords in *Shaw v. Neale*, 6 H. L. C. 581. The statute is in very terms followed, for the Master certifies what is due, and that the Judge directs to be paid (as I now do), whereupon payment is enforced according to the practice by execution, under R. S. O. ch. 66, sec. 72.

The order to tax may reserve questions of retainer or negligence in a proper case, but if it does not I cannot perceive why the client should be allowed a double chance of defeating the solicitor's claim, as is here in effect urged. Because if the Master has jurisdiction as to negligence, the client by his act submits to that method of trial, and fail-

ing to ask or get relief, he should not reserve his defence for another and later forum: *Re Hair*, 10 Beav. 187. The Master in *Re Clark*, 9 P. R. 337, was directing as to the form of order, but his observations as to the ultimate effect of order then granted were *obiter*. The application was also by the solicitor, and a discretion might well be exercised in one way as to him, and in a different way as to the client. The decision of Osler, J., in *Re A. B.*, 8 P. R. 126, was before the Judicature Act, and was restricted to the right of the solicitor at common law to a summary order upon the result of his own application for taxation. The taxing officer has now inherent jurisdiction, by virtue of Rule 438, to examine witnesses and to determine all matters going to defeat the right of the solicitor to recover costs in the Common Law Divisions as fully as he had theretofore in the Chancery Division, and this being in conformity with the English practice goes strongly to shew that there is jurisdiction in this Court (as there was in the former Court of Chancery) to grant summary relief in furtherance of justice: *Re Farington*, 33 Beav. 346. The last case as to the scope of the taxing officer's powers is *Re Herbert*, 34 Ch. D. 504.

The other case cited before me of *Macdonald v. Piper*, 10 P. R. 586, was one in which the solicitor made the application for taxation, and the Master held as he did in *Re Clark* touching the form of the order. The Master may have rightly exercised his discretion in refusing to refer the question of liability to the taxing officer: *Ex p. Ditton*, 13 Ch. D. 318.

If the client in this case chooses to pay the costs of opening up the taxation, and an affidavit is made that the question of negligence was not raised before the Master on account of the Chambers decisions I have referred to and distinguished, I am disposed to send it back to him to deal with this contention—otherwise the order to pay forthwith will be as asked, and with costs of the application. I will also give the client the alternative leave to pay the whole amount into Court, to abide the result of an action for damages against the solicitor for the alleged negligence.

The conclusion I have reached is quite in accord with the opinion of Patteson, J., as found in *Baker v. Meryweather*, 2 C. & K. 737, to this effect: If an action is brought on an attorney's bill, and after action it be taxed on the defendant's application, without any reservation in the order to tax as to the question of liability, the defendant cannot afterwards deny liability: but if in the order power is reserved to the defendant to amend his pleas after the taxation, he might still, by pleading, deny his liability, and raise that question for trial.

[No steps were taken by the client to have the allegation of negligence investigated within the time limited by the order issued pursuant to this decision, or within the further time allowed by a subsequent order made on the 27th June, 1887.]

CENTRAL BANK OF CANADA V. OSBORNE ET AL.

Counter-claim—Slander—Action on promissory note.

To an action on a promissory note the defendant L., the endorser, pleaded that by an arrangement made with the plaintiffs, who had discounted the note, it was to be renewed from time to time, and paid out of the proceeds of a certain agency business, in which the defendant O., the maker of the note, and the defendant L. were engaged as partners; that the defendant O. had absconded, and that afterwards the plaintiffs had, by libel and slander of the defendant L., prevented him from securing the continuance of the agency business for himself, whereby he was unable to carry out the arrangement; and he also pleaded a counter-claim against the plaintiffs for the alleged libel and slander.

The Court, [Rose, J., dissenting,] struck out the counter-claim, upon an application under Rule 127 (b), O. J. A.

Per CAMERON, C. J.—There is a wide range of discretion under Rules 127 (b), 168, and 178. In actions where malice is an essential element and the damages are sentimental without a legal rule to guide in their measurement, there is much more injury likely to arise to the cause of justice by allowing such a counter-claim than can possibly spring from the defendants being forced to bring an independent action.

Per ROSE, J.—The charge of libel arises out of the circumstances giving rise to the claim and defence. If the facts set up by L. do not constitute a valid answer in law to the claim, the plaintiffs may recover judgment against him, when peradventure he is in law and justice entitled to damages against them, exceeding the amount of such claim; but if the facts constitute a defence to the claim, they must be allowed to be shewn in evidence, and no good will be achieved by not allowing the counter-claim to stand.

[June 25, 1887.—*The Common Pleas Division.*]

AN APPEAL by the plaintiffs from an order of the Master in Chambers, refusing to exclude the counter-claim of the defendant Leeming. The appeal was referred to the Divisional Court by Armour, J., before whom it was first brought on in Chambers.

Lefroy, for the appeal.

Ritchie, Q. C., contra.

The facts and authorities appear in the judgments.

CAMERON, C. J.—The plaintiffs appeal from an order made by the learned Master in Chambers, dismissing an application by the plaintiffs to strike out the defendant

Leeming's counter-claim against the plaintiffs for libel and slander, alleged to have been committed by the plaintiffs against him.

This action is brought by the plaintiffs, as holders and endorsers of a note made by the defendant Osborne and endorsed by the defendant Leeming. The defendant Osborne was agent in the city of Toronto for the Cunard line of steamers running between New York and Liverpool, and, according to the statement of the defendant Leeming, a partnership was agreed upon between him and the defendant Osborne in the business of general traffic agents and steamboat and railway ticket agents, to be carried on under the name and style of Osborne & Leeming; the defendant Leeming to have a half interest in the profits of the business, but was to forego or give up so much of his share of such profits as would amount to one-half of the defendant Osborne's then existing indebtedness. The defendant Osborne was indebted, as he represented, in \$2,500, and on the 27th day of January, 1887, a portion of the indebtedness amounting to \$900 became due, and Osborne asked the plaintiffs to advance him the money, which they agreed to do if Leeming would endorse the note; whereupon the note sued on was made by Osborne, and the defendant Leeming endorsed it on the understanding and agreement made with A. A. Allen, manager of the plaintiffs' bank, that the bank would not press for payment at maturity, but would renew the same and extend the time of payment from time to time so to enable the note to be paid off out of the future profits of the business done.

A week before the maturity of the note the defendant Osborne absconded from the Province. The defendant Leeming then applied to the Cunard Steamship Company for the appointment of agent at Toronto for the company. The plaintiffs, the defendant Leeming alleges, professed to be friendly to the defendant, and willing to use their influence with the general agent of the company at New York, to obtain for him the appointment, but in truth they

were opposed to the defendant Leeming getting the agency, and used their influence on behalf of certain relatives of officials of the plaintiffs, and charged the said Leeming with having been guilty of fraud and misrepresentation in obtaining the advance of \$900 on the said note from the plaintiffs, by reason whereof the Cunard Steamship Company refused to appoint Leeming their Toronto agent.

The defendant Leeming pleaded the alleged agreement with the plaintiffs' manager, A. A. Allen, and counter-claimed in respect of the alleged libel and slander.

The plaintiffs applied to strike the counter-claim out on the ground that it is calculated to embarrass the plaintiffs, and to render the obtaining evidence under commission in New York necessary, and might thus delay or hinder the trial of the plaintiffs' action.

There is no doubt such a claim as this, though sounding purely in damages, may be pleaded against an action on a money demand under rule 127 of the Judicature Act, but it is equally clear that it is in the discretion of the Court or a Judge, under sub-sec. *b.* of the said rule, on the application of the plaintiffs, to refuse to allow the defendant to avail himself of the rule, if in the opinion of the Court or Judge the counter-claim cannot be conveniently disposed of in the pending action, and ought not to be allowed.

In an action of slander or libel there is no precise measure of damages. The damages are wholly in the discretion of the jury, and in a case like the present, if a right to damages could be made out at all, the jury might be influenced in arriving at their verdict by the amount of the plaintiffs' claim. It seems to me, in actions where malice is an essential element, and the damages are sentimental, without a legal rule to guide in their measurement, there is much more injury likely to arise to the cause of justice by allowing such a counter-claim than can possibly spring from the defendant being forced to bring an independent action for the redress of any wrong he may have suffered by the alleged libellous or slanderous matter.

The discretion of the Court would seem to take a wide range under sub-sec. *b.* to rule 127, and rules 168 and 178.

There seems to have been much diversity of opinion among English Judges as to whether the counter-claim must not in some way be directly connected with the plaintiffs' cause of action. In *Padwick v. Scott*, 2 Ch. D. 736, Vice-Chancellor Hall thus expressed his opinion on the point, p. 744: "Admitting that the rule may embrace cases of a different character, the set-off is to have the same effect as a statement of claim in a cross action, so as to enable the Court to pronounce a final judgment in the same action, and it must be a cross action of a nature connected with the particular original cause of action, so as to be capable of being fairly and reasonably dealt with by way of set-off or counter-claim therein."

Lord Justice Bramwell, in *Pellas v. Neptune Marine Insurance Co.*, 5 C. P. D. at p. 40, said: "The argument for the defendants was that whatever was a defence to a liquidated claim, has been made by order 19, rule 3 (our rule 127), a defence to an unliquidated claim. I cannot assent to that argument; according to it, if A. sues B. for damages for breaking his leg, B. may set up as a defence a claim against A. as the acceptor of a bill of exchange; is it possible to say that can be deemed a defence?"

In *Macdonald v. Carington*, 4 C. P. D. 28, Mr. Justice Lindley said, in reference to the rule in question, p. 38: "Reading that without the context or other sections, or the light of authorities, I should understand that the defendant in any action might set off, or set up by way of counter-claim, any claim against the plaintiff in the same character in which he sues himself, and the proviso to the section confirms that view."

And Mr. Justice Fry, in *Beddall v. Maitland*, 17 Ch. D. 174, 181, said: "It is, to my mind, evident that there is no intention to confine the claim made by the counter-claimant to damages, or to an action of the same nature as the original action, and therefore, when it is said that the defendant may set up against the claim of the plaintiff a

claim of his own, it does not necessarily mean that the claims are to be *ejusdem generis*, because it says expressly 'whether such counter-claim sound in damages or not.'"

I agree with the views expressed by Mr. Justice Lindley and Mr. Justice Fry, which are concurred in by Mr. Justice Kay in *Gray v. Webb*, 21 Ch. D. 802. At page 805 he says: "Reading all these rules (the rules to which I have referred), together, I think it is expedient to give a wide interpretation to order 19, rule 3, but by that and the other rules power is reserved to the Court to strike out any counter-claim which may be inconvenient, for example, such counter-claim as might cause an undue delay in the trial of the action." In that case he disallowed a counter-claim in respect of a money demand against a money demand on the ground that the counter-claim, owing to the many items of which it was made up, would take a considerable time to verify. The plaintiffs' claim was a lump sum of £1400, the price of an estate sold by plaintiff to defendant, while the defendant's counter-claim only amounted to £250. If the disparity in amount furnishes a reason for disallowing a counter-claim, where on the one side the claim is for a liquidated amount, and on the other the amount is peculiarly speculative and uncertain, as in this case, the reason ought to have greater force. I think, however, the converse would not hold good; as for instance, if the defendant were the plaintiff suing in libel, I see no valid reason why these plaintiffs should not have a right to counter-claim in respect of their note on the facts disclosed by the evidence, if they saw fit to run the risk of enhancing the damages against them by showing their claim against the defendant. If the defendant owed the plaintiffs a money demand there is no reason in equity or justice why the plaintiffs should not recover in the same action the amount of such demand, unless the trial of it is calculated to delay or embarrass the plaintiff in the trial of the action for damages.

I am of opinion this appeal should be allowed, with costs to be costs in the cause to the successful party, and the defendant's counter-claim should be struck out without prejudice to his bringing a fresh action.

ROSE, J.—I am unable to say that the discretion exercised by the learned Master in permitting the counter-claim to stand was exercised in error.

I am much impressed with the argument that the charge of libel arose out of the circumstances giving rise to the claim and defence.

If the bank was to wait for payment of the claim out of the profits of the business, and by libellous accusations prevented the defendant from either continuing the business or engaging in a similar business out of which profits might have been made, it seems to me rather cruel that, if such facts do not constitute a valid answer in law to the claim, the bank may be allowed to recover judgment, when peradventure the defendant is in law and justice entitled to damages exceeding the amount of such claim.

If the facts constitute a defence to the claim, then they must be allowed to be shown in evidence, and no good will be achieved by not allowing the counter-claim to stand.

If the hearing of the claim and the counter-claim before the same jury would be inconvenient, or possibly unfair, to either party, then under rule 256, O. J. A., the claim on the note might be tried, and immediately afterwards the counter-claim could be disposed of without the extra expense to the parties of bringing their witnesses a second time to the trial, and a defendant would not suffer an injustice in having a judgment against him for a considerable sum, while at the same time he had untried a claim which, upon trial, would be allowed for a larger amount.

I do not think the defendant should be deprived of his right to counter-claim in this action because slight delay might be caused by issuing a commission to New York. As a matter of fact there need be no delay in this case, as

the evidence could easily be obtained in time for the Fall Sittings.

In my opinion the appeal should be dismissed, with costs.

GALT, J., concurred in the judgment of Cameron, C. J.

Appeal allowed and counter-claim struck out.

[The minute of the order of the Court was as follows :
Appeal allowed, with costs to be costs in the cause to
successful party, and that defendant's counter-claim be
struck out, without prejudice to his bringing a fresh action ;
and if fresh action be brought, that judgment shall not be
signed in this action without the order of the Court or a
Judge.]

RE MACFIE V. HUTCHINSON—CITY OF LONDON,
GARNISHEES.

Prohibition—Division Court—Attachment of debts—R. S. O. ch. 47, sec. 125—"Employee"—Medical health officer.

The defendant was the medical health officer of the city of London, and his monthly salary as such was attached in the hands of the city corporation, in a Division Court action. It was claimed by the defendant that \$25 of the amount due him was exempt from attachment under R. S. O. ch. 47, sec. 125. No facts were in dispute, and the Division Court Judge determined, as a matter of law, upon the construction of the above section, and of the Public Health Act, 1884, and amending Acts, the Municipal Act, 1883, sec. 281, and a by-law of the city of London, that the defendant's salary was not so exempt.

Held, by ROSE, J., in Chambers, that the decision of the Judge could be reviewed upon a motion for prohibition, and that he had determined wrongly.

Held, by a Divisional Court, WILSON, C. J., dissenting, that the defendant was not an employee within the meaning of R. S. O. ch. 47, sec. 125, and that it was therefore rightly determined that his salary was not exempt.

[April 2, 1887.—*Rose, J.*]

[June 28, 1887.—*The Queen's Bench Division.*]

THIS was a motion for prohibition directed to the Judge of the County Court of Lambton, acting Judge of the 1st Division Court of Middlesex, and the clerk, to restrain proceedings to enforce a judgment ordering payment by the garnishees of more than \$8.33, the whole judgment being for \$33.33.

G. W. Marsh, for the motion.

Shepley, contra.

ROSE, J.—There are two questions to be considered.

1. Whether prohibition lies.

2. If so, whether a medical health officer appointed by a municipal council is a "servant, clerk, or employee" within 37 Vic. ch. 13, sec. 1, (R. S. O. ch. 47, sec. 125) which provides that "No debt due or accruing due to a mechanic, workman, labourer, servant, clerk, or employee for, or in respect of his wages or salary, shall be liable to seizure or

attachment under this Act, unless such debt exceeds the sum of \$25, and then only to the extent of such excess."

The learned Judge's first duty was to try and determine whether anything, and if anything, how much was due to the primary debtor by the garnishees, and to make such enquiry he had jurisdiction to enter upon the hearing and receive the evidence.

Having found, as he did in this case, that \$33.33 were due to him, then, if it appeared that he was one of those for whose protection the above provision was made, the Judge had power to order that the excess over the \$25 should be attached.

To determine the second question, he must of course consider and decide whether, in his opinion, the primary debtor came within the class. That in this case was to be determined upon undisputed evidence, viz.: The Public Health Act, 1884, ch. 38, sec. 20; of 1885, ch. 45; and of 1886 ch. 42; the Municipal by-law No. 319; Municipal Act, 1883, sec. 281; the above sec. 1 of 37 Vic. ch. 13.

There are no facts in dispute. The determination is one of law. The want of jurisdiction (if any) is to make the order, not to entertain the application. If prohibition will not lie it seems difficult to suggest what remedy an aggrieved party would have, as there is clearly jurisdiction to proceed with the enquiry, and to make the order as to the excess, if any.

Mr. Shepley cited *Toft v. Rayner*, 5 C. B. 162; *Siddall v. Gibson*, 17 U. C. R. 98; *Colonial Bank of Australasia v. Willan*, 5 P. C. 417.

In *Toft v. Rayner* Wilde, C. J., said: "Whether the plea was good or bad, was a matter of law, which he was bound to decide: and his decision was final."

In *Siddall v. Gibson* it was held that the fact that a decision was against law and good conscience was no ground for a writ of prohibition. In that case the Judge of the Division Court held that the plaintiff could recover on a promissory note against the endorser without proving presentment and notice. Robinson, C. J., said: "Undoubtedly

in this Court we could not so have determined ; but admitting that in determining as he did the Judge determined wrong, both as regarded the law and the good conscience of the case, yet that is not a ground for prohibition when he had jurisdiction, as he certainly had here."

It will be observed the questions decided in these cases were in the progress of the trial, the inferior Court having jurisdiction over the subject matter.

In the case before me the learned Judge had jurisdiction to determine whether the primary debtor was one of those coming within the above section. If he had decided in his favour, could the plaintiff have obtained a mandamus to compel him to review his decision and decide otherwise ? He equally had jurisdiction to determine, although he decided against the debtor. The error, if an error, is one probably of law—the facts being admitted, and arises from a misconstruction of the statute. But in *Re Bowen*, 15 Jur. Q. B. 1196, it was held that error in construing a statute was not ground for prohibition.

The jurisdiction of the learned Judge to make the order depended upon the determination of the question as to whether the debtor came within the privileged class.

Mr. Marsh cited *Ex parte McFee*, 9 Ex. 261 ; *Elston v. Rose*, L. R. 4 Q. B. 4, and *Regina v. McDonald*, 12 O. R. 381.

In *Ex parte McFee* it was held that the decision of the County Court Judge with respect to the sufficiency of the statement of the claimant's address in an interpleader matter was not conclusive, but subject to review by the Superior Court on motion for a prohibition. The rule of Court provided that his address "shall be fully set forth."

In *Elston v. Rose* it was decided that where a Judge has given himself jurisdiction by an erroneous conclusion upon a point of law, he is in fact without jurisdiction and has no authority to entertain the question.

In that case it was necessary in order to determine the "value of the tenements," to ascertain whether he had jurisdiction. If they did not exceed £20 by the year, he had jurisdiction, otherwise not.

The Court held that he had misconstrued the Act of Parliament, and had given a wrong meaning to "value."

In *Ahrens v. McGilligat*, 23 C. P. 171, and *Westover v. Turner*, 26 C. P. 510, prohibition was granted to prevent garnishee proceedings against the Grand Trunk Railway Company as not living and carrying on business within the division. In these cases the Judge of the Division Court had to enter upon the enquiry and decide the questions, and as he decided one way or the other, he determined whether or not he had jurisdiction.

The Division Court has no jurisdiction in "actions of ejectment or actions in which the right or title to any corporeal or incorporeal hereditaments, or any toll, custom, or franchise comes in question."

In such cases the Judge of the Division Court has jurisdiction to enter upon the enquiry and determine whether he has jurisdiction, but his decision is not final, and if in error, prohibition may be granted: *Thompson v. Ingham*, 14 Q. B. 710.

In *Re Bushell v. Moss*, 11 P. R. 252, the Common Pleas Divisional Court refused prohibition, where the learned Judge determined that a mirror was a chattel, the jurisdiction depending upon such fact.

In giving the judgment of the Court I did not find it necessary to determine the right to review the finding of fact, saying: "In the present case, even if the power to interfere exists, there are no grounds sufficiently strong to warrant our interference with the finding of fact." As there was in that case conflict of evidence, the Court would have been very loth to interfere. In the language of Cockburn, C. J., in *Elston v. Rose*, L. R. 4 Q. B. at p. 7: "If there has been a real conflict of testimony upon some fact which goes to the question of jurisdiction, the Court will not interfere, except upon very strong grounds."

It may be that the expression of opinion by myself in *Re Bushell v. Moss*, viz.: "Having so decided, his decision as to the fact will not be reviewed on a motion for prohibition," is too strong. I do not say it is, but wish to consider it

further, if it become necessary to do so, in a case where jurisdiction has been assumed upon a finding of fact where there was a dispute upon the evidence and the conclusion is attacked on a motion for prohibition.

In *Re Brown v. Cocking*, L. R. 3 Q. B. 672, the question was, as to the meaning of "the rent payable," and the "value of the tenements."

The Court on a motion for prohibition considered and determined the meaning of "rent payable," and held that the construction of the learned County Court Judge was correct, and refused prohibition, refusing to review his decision as to value.

Cockburn, C. J., said the Court could not look to see whether the decision was, on the balance of evidence, right or not.

Lush, J.: "As to that there was evidence on both sides; and I think the Judge's decision is conclusive when there was evidence before him on which he might decide as he has done."

Hannen, J.: "I have some little hesitation in saying that we are actually precluded from reviewing the decision of the Judge on conflicting evidence; but without expressing any decided opinion on the point, I think that in a case of such nicety as the present we ought not to interfere with his decision."

In *The Queen v. Local Government Board*, 10 Q. B. D. at p. 321, Brett, L. J., said: "I think I am entitled to say this, that my view of the power of prohibition at the present day is, that the Court should not be chary of exercising it, and that wherever the Legislature entrusts to any body of persons other than to the Superior Courts the power of imposing an obligation upon individuals, the Courts ought to exercise as widely as they can the power of controlling those bodies of persons, if those persons admittedly attempt to exercise powers beyond the powers given to them by Act of Parliament."

I do not make this quotation for the purpose of asserting a necessity of guarding individuals against the exercise

of jurisdiction by Judges of Inferior Courts—there is of course no such necessity, but where there is no right of appeal, Superior Courts must not hesitate, if they take a different view to that held by the inferior Court, as to jurisdiction, to exercise the power of prohibition, if such power exists; and I made the reference to shew that the learned Judge, Brett, L. J., did not deem that the tendency of the present was towards the restriction of such power.

In *Regina v. McDonald*, 12 O. R. at p. 389, Wilson, C. J., held that where there was no conflict of evidence the decision of a Justice of the Peace was reviewable upon a matter of fact. In that case the jurisdiction of the magistrate depended upon the determination of the question of whether the defendant in removing a certain gate from the highway acted upon a “fair and reasonable” supposition of right.

The evidence was all one way, the decision of the Justice the other, and the conviction was quashed.

That decision may be thought to conflict with the case of *Brittain v. Kinnaird*, 1 Br. & B. 432, where it was said that the question of whether a certain vessel was or was not a boat, was one of fact for the magistrate, and Dallas, C. J., said, that if a magistrate had seized a ship of seventy-four guns and called it a boat, the judgment of the Court would have been the same.

It must be remembered that in *Brittain v. Kinnaird* the question was not as to the power to review the finding of a magistrate on a question of law or fact, on a motion to quash, but was as to whether the conviction was conclusive evidence of the facts stated in it, in an action against the magistrate, no defects appearing on its face—and it was held it was.

If the statute had stated that the wages of any labourer should not be subject to attachment, and upon uncontradicted testimony the judgment of the Division Court had held that a bricklayer working for \$1 a day, was not within the class denominated “labourer,” would such decision be more final than a decision as to the value of

tenements, or as to whether an interest in land came in question?

Is there any difference between such a case and the present, assuming the learned Judge to have erred, where the statute in effect says that the wages of a laborer shall not be liable to attachment unless they exceed \$25.

I venture to think that the learned Judge had the right and was bound to enquire, as he did enquire, whether the debtor came within the class of persons named in the Act and whether there was a sum in excess of \$25 due, and that upon its appearing that the debtor came within the class or one of the classes named, he had no jurisdiction to make an order as to the \$25, and that his decision on uncontradicted facts—I need say nothing in this case as to a decision on balance of testimony—is open to review on this motion.

It may be that the case comes fairly within the class referred to in *The Colonial Bank of Australasia v. Willan*, 5 P. C. 417, and found cited in *Re Chisholm and The Corporation of Oakville*, 12 A. R. at p. 230, “in which the Judge of the inferior Court, having legitimately commenced the inquiry, is met by some fact, which, if established, would oust his jurisdiction, and place the subject, matter of the inquiry beyond it.”

The judgment of the Court in 12 A. R., delivered by Mr. Justice Osler, is very instructive on the whole subject, and collects most of the cases I have referred to.

I think then I must enquire whether the debtor was a “servant, clerk, or employee,” for it can hardly be contended that he was a “mechanic, workman, or labourer.”

The order of the classification must be observed. “Mechanic, workman, labourer, servant, clerk, or employee.” Employee, while it would embrace all the others in its literal meaning, is in one sense the term indicating the highest class of employment. “No debt, * * for or in respect of his wages or salary.” Ordinarily we would not expect a mechanic, workman, labourer, or servant

to be employed at a salary, while they would generally earn wages.

The debtor was certainly in the employment of the garnishees at a salary. Literally he is one of the class designated by the term "employee." Is there anything to take him out of the literal construction or interpretation?

By 47 Vic. ch. 38, sec. 20, (O.) "Every municipal council may appoint a medical health officer and a sanitary inspector or inspectors for the municipality, and may fix the salaries to be paid them. * * "

The possible duties which he may be called upon to perform under the Act are numerous and may be onerous and occupy his whole time. See amongst others sec. 30 of 47 Vic. ch. 38, and sec. 281 of 46 Vic. ch. 18, (O.)

The by-law appointing the debtor as medical health officer is in the terms of the statute, and fixes the salary at \$400 per annum, payable monthly.

Mr. Shepley relied upon *Gordon v. Jennings*, 9 Q. B. D. 45, where it was decided that the salary of a secretary to a company, amounting to £200 a year, was not "wages" of a "servant," within the Wages Attachment Abolition Act (33 & 34 Vic. ch. 30) and was therefore not exempted from attachment by that Act. The words of the Act were "wages of any servant, labourer, or workman." The meaning of "servant" was there determined from its collocation with "workman" and "labourer," and popular signification. The words "clerk" "employee" or "salary" were not found in the Act.

In *Bouvier's Law Dictionary*, I find "employee" defined as being "a term of rather broad signification for one who is employed."

Mr. Marsh, referred to *Ex parte Ormrod*, 1 D. & L. 825, *Lowther v. Radnor*, 8 East. 113; *Grainger v. Aynsley*, 6 Q. B. D. 182.

In *Ex parte Ormrod*, a "pattern designer," who was described as an "artist" whose employment was "to form designs, and plans, and ideas for the producing of patterns to be afterwards engraved upon copper rollers," was held to

be an "artificer," which word was collocated with "calico printer, handicraftsman, miner, collier, pitman, glassman, potter, labourer, or other person of the like description."

In *Lowther v. Radnor* it was held that the statute, 20 Geo. 2 ch. 19, giving the magistrates jurisdiction to determine differences between masters and servants in husbandry, artificers, handicraftsman, miners, potters, &c., and other labourers, extended to labourers of all descriptions.

In *Grainger v. Aynsley*, a "potter's printer" under a contract with his employers to do work in which he was assisted by "transferrers," whom he himself engaged and paid, was held a "workman" within the meaning of 38 & 39 Vic. ch. 90. The decision depends on the wording of the Act, and does not assist us here.

I am of the opinion that the debtor was an "employee" within the meaning of the Act, and that his salary to the extent of \$25 was exempt from attachment under the provisions of the Act, 37 Vic. ch. 13, sec. 1.

I think the words "employee" and "salary" read together cannot refer to a day labourer, or mechanic, workman, or servant, in their ordinary signification, and with the word "clerk" must have been introduced to embrace subordinate officials on salaries, whose families suffered quite as much from having the last dollar attached as did the family of a day labourer when his wages were swept away.

The tendency of modern legislation seems to have been in the direction of recognizing that it is not in the interest of society that a debtor and his family should be deprived of all means of subsistence, even for the purpose of paying an honest debt.

Great want, misery, and a terrible temptation to crime often follow hard upon the heels of an officer of the law, set in motion by a creditor who is careless of what may follow provided his debt is paid, and he is not personally disturbed by witnessing the suffering caused thereby. Our Legislatures pass laws to relieve the honest and unfortunate, even

though they sometimes afford a shield for the improvident and dishonest, and I venture the opinion that no good end is served by any law which permits the officers to turn upon the street helpless women and children without food or shelter. The cruelties of the debtors' prison are rapidly becoming things of the past—it may be the next generation will view the exercise of some of the powers now existing to enforce the payment of debts from suffering poor as no less cruel. I, of course, know not whether the debtor in the present case is one requiring or deserving assistance.

I am not of the opinion that it is my duty to narrow the construction of the Act, but to interpret it with liberality, giving it its full and fair meaning, and therefore cannot restrict its meaning as the primary creditors have asked me to do.

The order must go prohibiting further proceedings to enforce the attachment as to the \$25. I see no ground upon which I can refuse costs to the appellant, the primary debtor, but such costs must be set off against the judgment debt.

The plaintiff appealed from this decision to the Queen's Bench Divisional Court.

A. W. Aytoun-Finlay, for the plaintiff.

G. W. Marsh, for the defendant.

O'CONNOR, J.—Sec. 2 of ch. 190, R. S. O., provides that: "The members of the municipal council of every township, city, town, and incorporated village, and the trustees of every police village shall be health officers within their respective municipalities, under the next five sections of this Act; but any such council may by by-law delegate the power of its members as such health officers to a committee of their own number, or to such persons, either including or not including one or more of themselves, as the council thinks best."

Secs. 3, 4, and 5 give such health officers certain powers, and assign duties.

Sec. 6 empowers such health officers, or a majority of them, "by warrant under their hands" to "authorize any two medical practitioners to enter in and upon any house, out-house, or premises in the day time for the purpose of making inquiry and examination with respect to the state of health of any person therein; and may also, upon the report of such medical practitioners, in writing, recommending the same, cause any person found therein infected with a dangerously contagious or infectious disease to be removed to some hospital or other proper place; but no such removal shall take place unless the said medical practitioners state in their report that such person can be removed without danger to life, and that such removal is necessary in order to guard against the spread of such disease to the adjoining house or houses."

This section recognizes the fact that some of the privileges therein conferred are to be exercised by medical practitioners only, and that others of such privileges are to be exercised only on the report of the medical practitioners; and the very nature of these privileges requires that it should be so.

In 1884 the Statute, ch. 38, (47 Vic. ch. 38) of Ontario, was passed.

It does not repeal the Revised Statute respecting the Public Health, but it makes further and other provisions, some of which are inconsistent with provisions of the former Statute.

By sec. 12 (1) of ch. 38, the later Act, "All the powers and authorities conferred upon or vested in the members of any municipal council or councils by any statute of the Legislature of this Province, as health officers of the said municipality or municipalities, shall hereafter be vested in the local or district board of health which shall be formed in such municipality or municipalities as hereinafter provided

"(2) There shall be a local board of health in each township and incorporated village, to be composed of the reeve,

clerk, and three ratepayers, to be appointed annually by the municipal council."

Sub-secs. 3 and 4 respectively provide that in a town containing less than four thousand the local board of health shall consist of the mayor, clerk, and three ratepayers; and that the local board of health for each city and for each town containing more than four thousand inhabitants shall consist of the mayor and eight ratepayers, to be appointed annually by the municipal council.

By sec. 20: "Every municipal council may appoint a medical health officer and a sanitary inspector or inspectors for the municipality, and may fix the salaries to be paid them," &c.

Here the expression "medical health officer" is used for the first time.

Before we had health officers, which term may be regarded as the *genus* or class, and by adding the *differentia*, medical, we have the species or subordinate class.

The qualifying word, medical, has a technical meaning, which agrees, however, with its popular meaning in the common expression, a medical man, or a medical practitioner.

It seems, therefore, to follow that only a medical practitioner can be appointed medical health officer. And this conclusion is confirmed by sec. 29, which says:

"A medical health officer of a municipality may exercise any of the powers conferred upon health officers by secs. 3, 4, and 5 of the Revised Statute respecting the Public Health, and may, without being specially authorized by the board, exercise any powers which under sec. 6 can be conferred upon two medical practitioners, and the board may act on his report."

This, as it appears to me, leaves no doubt. The medical health officer is by this section invested with all the powers which before could be exercised by two medical practitioners, and by them only. This view is further confirmed, and, indeed, established by section 41, as follows: "Where any local board of health is of opinion, on the certificate

of its medical health officer or of any other legally qualified medical practitioner, that the cleansing and disinfecting of any house," &c. In other sections the medical health officer is coupled disjunctively and alternatively with "the attending physician"; for instance, in secs. 47 and 48. Now the Act 48 Vic. (1885) ch. 45, sec. 2, empowers the Provincial Board of Health in certain cases to request the council of any municipality to appoint a medical health officer, and then says, "the council shall forthwith appoint a properly qualified medical practitioner to be medical health officer for the municipality." Sec. 3 empowers the Lieutenant-Governor, in case the council does not appoint upon such request, upon the recommendation of the Provincial Board, to appoint a medical health officer for the municipality.

In all other cases the council of the municipality appoints the medical health officer, and may fix his salary; but he serves, not the council, but the Board of Health, local and provincial. He is the officer of both boards and of each of them, in the municipality. Under sec. 7, of the last Act, in case the appointment is made by the provincial board, he is entitled to recover from the municipality reasonable compensation for his services. He is appointed because of his qualification as a medical practitioner, and as such for the most part he acts under the title of "medical health officer," which is merely his official designation.

He is an officer, but I think in no sense is he an "employee" within the meaning of sec. 125 of ch. 47, R. S. O.

The word employé, or employee, as the Statute has it, is not a legal term, nor is it an English word, but a word imported with its native pronunciation from the French language, which is frequently used by English speaking people as a convenient common-place term to designate the relation or situation of a class of persons who are not precisely menial servants, but whose whole time and services are employed and paid for by another person or persons, or by a corporation, or by the government. Our best pronouncing lexicographers treat it as a foreign word, and try

to import and preserve its native pronunciation by the use of such combinations of letters as they consider most likely to convey to English ears the nearest approximation to the native sounds of its several syllables. But the result coming from English tongues is generally ludicrous to French ears. In Spiers and Surenné's French pronouncing dictionary (1881) the word employé is defined (1) a person employed, person in any one's employ—*quelqu'un*; (2) (in public administration) a clerk. It seems to me too clear for mistake that the term, "employé," cannot in its ordinary acceptation be applied to members of any of the learned professions. As a fact, I think it is never in common usage applied by either the learned or the unlearned to a practising physician, a lawyer, a clergyman, a surveyor, or a civil engineer, practising his professional avocation, or what pertains thereto. A medical health officer may pursue his regular practice as a physician and perform the occasional duties of medical health officer, and he is paid, if paid at all, only according to the services he is called on to render. He is appointed because of his professional qualification to perform professional duties, and is, in my judgment, no more an employé than any other physician exercising his regular practice.

If this conclusion is right, then unquestionably a medical health officer is not embraced by or included in the terms of the sec. 125, nor is he one of the classes or persons referred to therein. That section is as follows, viz.:

"No debt due or accruing due to a mechanic, workman, labourer, servant, clerk, or employee for, or in respect of his wages or salary, shall be liable to seizure or attachment under this Act, unless such debt exceeds the sum of \$25, and then only to the extent of such excess."

My interpretation is supported, I think, by the maxim, *ejusdem generis*.

Wilberforce on Statute Law, p. 179, says: "The operation of general words has almost invariably been restrained when they follow closely upon words of a limited meaning, upon words which refer to a particular class of

things or persons, or which necessarily exclude such matters as are of higher dignity. In all these cases general words are confined to things and persons *ejusdem generis* with those enumerated, or of inferior quality."

The same principle of interpretation is posited in *Hardcastle* on the Construction of Statutory Law, at p. 83, *et seq.*, where the cases of *Regina v. Edmundson*, 28 L. J. Mag. C. 213; *Regina v. Payne*, L. R. 1 C. C. R. 27; *Ashbury Co. v. Riche*, L. R. 7 H. L. 653; *Casher v. Holmes*, 2 B. & Ad. 592, are cited in support of the rule so laid down.

The same rule of construction, in substantially the same language, is laid down in *Broom's Maxims* (6th ed.) pp. 605 and 606—and see notes, (g), (h), (i) on the last-mentioned page.

In the statute in question in this case, the words "mechanic workman, laborer," are words of a limited meaning; the words "servant, clerk," are also limited, and although more general than the preceding words, they have a well-understood meaning, differing in no wise from the plain meaning of "workman or laborer," except in the generality of the first, and the supposed refinement of the second; but the word "employé" is not only more general than any of the preceding, but has in itself no definite meaning, and must be controlled by the preceding words, and therefore expresses nothing more.

In *Morgan v. The London General Omnibus Co.*, 12 Q. B. D. 201, it was held that an omnibus conductor was not a workman within the meaning of the Employers and Workmen's Act, 1875.

Day, J., at page 206 says: "In common parlance, no one would call an omnibus conductor a journeyman. Neither is he an artificer or handicraftsman. And the general words, 'or otherwise engaged in manual labor,' refer to labor *ejusdem generis* with the specific kinds before mentioned." And see the same case in Appeal, 13 Q. B. D. 832; and the reasoning of Brett, M. R., and of Bowen, L. J., at pp. 833, 834. *Davis v. Berwick*, 30 L. J. Mag. C. 84; *Hardy v. Ryle*, 9 B. & C. 603; *Lancaster*

v. *Greaves*, 9 B. & C. 628 ; *West v. Smallwood*, 3 M. & W. 418 ; *Johnson v. Reid*, 6 M. & W. 124, are cases that may be usefully consulted, as aiding in the interpretation of the clause now under consideration.

In the case of *Regina v. Cleworth*, 4 B. & S. 927, it was held that a farmer was not within the Statute, 29 Car. 2, ch. 7, sec. 1, which enacted that "no tradesman, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labor, business, or work of their ordinary callings upon the Lord's day, or any part thereof, works of necessity and charity only excepted."

The judgment of Cockburn, C. J., at p. 932, is clear, strong, and decisive.

I presume the primary debtor in this case would object if summoned to appear on a charge laid against him under our Lord's Day Act for having laboured, on the Lord's day, either as medical health officer or as practising physician.

I am confident he would invoke the aid of the last mentioned case, and I dare say he would succeed on the authority of that case.

Manton v. Tabois, 30 Ch. D. 92, is a case in which the rule *ejusdem generis* is applied to the words "furniture, goods, and chattels," in a bequest.

From what has been said already on the subject it appears that the medical health officer receives his appointment and becomes such primarily because of his qualification as a medical practitioner, that is to say, he could not receive the appointment unless he was so qualified.

He is, therefore, selected and appointed, and by his appointment authorized and required to exercise his skill and judgment in the performance of certain functions in relation to the public health, but in the performance of these functions he has necessarily to deal, and is authorized to deal, with individual cases of sickness in so far as they may affect the public health.

His duty is, therefore, to exercise his professional, his scientific skill and judgment independently, free from the control or direction of any other person. He is, therefore,

not a servant, not a clerk, whose position in the ordinary acceptation implies control and direction, nor is he an employé, for he is appointed, not employed, to perform the functions of his office ; and besides, that, the rule *ejusdem generis* prescinds his position from the category or categories of the preceding words in the clause.

I am, therefore, of opinion that the appeal must be allowed, with costs, and that the order of Mr. Justice Rose must be rescinded, with costs.

ARMOUR, J.—I agree with my brother O'Connor. I cannot understand how it can be held that a medical health officer, whose appointment, and dismissal, and the fixing of whose salary, alone rest with the municipal council, but whose duties are prescribed by statute, is an employee within the meaning of that term as used in R. S. O. ch. 47, sec. 125. In my opinion it is quite clear that he is not.

WILSON, C. J.—The statutes and cases bearing on this question are the following : R. S. O. ch. 47, sec. 125, enacts that “no debt due or accruing to a mechanic, workman, labourer, servant, clerk, or employee for, or in respect of his wages or salary, shall be liable to seizure or attachment under the Act, unless such debt exceeds the sum of \$25, and then only to the extent of such excess.”

Sec. 54 gives the Division Court jurisdiction of “all personal actions where the amount claimed does not exceed,” &c. ; and

“All claims for debt or for any sum payable upon any contract for the payment of money, or for payment in labour or in any kind of goods * * where the amount or balance claimed does not exceed,” &c.

Sec. 55 : “Upon any contract for the payment of a sum certain in labour or in any kind of goods * * the Judge, after the day has passed on which the goods or commodities ought to have been delivered or the labor or other thing performed, may give judgment for the amount in money as if the contract had been originally so expressed.”

47 Vic. ch.;38, sec. 20. (O.) "Every municipal council may appoint a medical health officer and a sanitary inspector or inspectors for the municipality and may fix the salaries to be paid them"; and by 48 Vic. ch. 45, sec. 4, he is removable at pleasure.

There is no doubt the medical health officer is not within the meaning of the terms mechanic, workman, labourer, servant, or clerk.

The other word to be considered is *employee*, and the question is, whether he can be said to be an employee. He was appointed by the municipality at a certain salary and is removable at pleasure, if that latter circumstance can make any difference.

I am of opinion such a person is an employee within the ordinary meaning of the word, and within the intent and meaning of the statute. The purpose was to secure to every one receiving wages or salary, at least \$25 of such wages or salary for himself or herself. The whole of any ordinary debt payable to such employee may be attached by his creditors, but wages or salary are to be subjected to that deduction at the least in favour of the debtor, and the statute should be liberally interpreted.

I quite agree with the conclusion my brother Rose has arrived at, that the last shilling for wages or salary is not to be taken from the medical health officer more than from the clerk, the latter of whom is or is supposed to be a person of much consequence and is frequently very highly paid and with a certainty and regularity which professional men are not accustomed to.

I am of opinion the writ should go, and with costs, such costs, as on this judgment which I follow, to be set off against the judgment debt of the primary debtor. But the judgment of my learned brothers will of course prevail.

FRAM V. FRAM.

Partition or sale—Dowress as applicant—R. S. O. chs. 55, 101.

Although some expressions in the Partition Act, R.S.O. ch. 101, authorize a person entitled to dower not assigned to apply for partition or sale of the lands in which she is interested, yet the Court may, in its discretion, refuse the application and leave the dowress to proceed under the Dower Procedure Act, R.S.O. ch. 55, or otherwise, to have her dower assigned. The provisions of the two Acts must be harmonized.

The application of a dowress for partition or sale of two parcels of land owned by the defendants in severalty, subject to the right of dower, was refused where the defendants opposed the application and the proposed proceedings were for the benefit of the applicant only.

Devereux v. Kearns, 11 P. R. 452, discussed.

[April 13, 1887—*Robertson, J.*]

[June 17, 1887—*The Chancery Division.*]

AN appeal by the defendants from an order of the local Master at London for partition or sale of certain lands. The facts appear in the judgment.

Hoyles, for the appeal.

R. M. Meredith, contra.

ROBERTSON, J.—This is an application by way of appeal from an order made by the local Master at London, for partition or sale of certain lands, under general order 640 of the late Court of Chancery, whereby all necessary enquiries are to be made, &c., and proceedings had for the partition or sale of the lands, &c.; and for the adjustment of the rights of all parties interested; and for a partition of part and sale of the remainder as may be most for the interest of the parties entitled, &c.; and that the said lands, or such parts thereof as the Master shall think fit, be sold, &c., freed from the claims of such of the incumbrances, &c., whose claims were created by parties entitled to the said lands before the death of the intestate, as shall have consented to such sale, &c., and subject to the claims of such of them as shall not have consented, &c., and freed from the dower of any person having dower

therein; and that the said Master do execute the conveyance on behalf of infant parties, &c., and that the purchase money be paid into Court, &c.; and further, that in the event of a partition of the whole or of a part only, and the proceeds of the sale of the remainder be insufficient to pay the costs in full, the costs, or so much thereof as remains unpaid, be borne and paid by the said parties, according to their shares and interest in the said lands.

The affidavit on which this order was obtained was made by the plaintiff, and sets forth that William Fram the elder, farmer, deceased, died on the 9th day of September, 1886; that the plaintiff is his lawful widow, and the defendants are his sons; that prior to the 20th day of May, 1870, the deceased was the owner in fee simple in possession of the following lands, viz., the easterly 150 acres of Lot No. 6 in the 4th Concession of the Township of Nissouri, in the County of Middlesex, on which last-mentioned day the deceased executed and delivered a deed of conveyance of the said lands to the defendant James B. Fram: that prior to the 16th day of August, 1883, the deceased also owned in fee simple in possession the southwest half of Lot 3 in the 5th concession of said township, containing 100 acres; and on the last-mentioned day the deceased executed and delivered a deed of conveyance of the said last-mentioned lands to his said son, the other defendant, William Fram; that although she was, at the time of the execution and delivery of the said several conveyances, the lawful wife of the deceased, she did not join in either of them, or bar her right of dower in the said lands; nor has she at any time since barred or released her right to dower, &c.; and that as the widow of the deceased she is entitled to dower in both parcels of land.

On the 26th February, 1887, the local Master made this order. The defendants admitted the plaintiff's right to dower out of each parcel, but opposed the order going for a sale, consented to her dower being set out and assigned to her out of each parcel, but protested against all the

enquiries being made which the order declares shall be, and that these farms should be sold, &c., and they now appeal against the order on the following grounds :

First : That the plaintiff being a dowress out of possession and having only a right of dower, (unassigned) in the said lands, is not entitled to take proceedings under the general orders of the late Court of Chancery and the practice in that behalf, or under the Partition Act, for partition or sale.

Second : That the lands ordered to be partitioned or sold consist of two farms, one of 150 acres owned by the defendant James B. Fram, in fee simple, and the other of 100 acres owned by the other defendant, William Fram, in fee simple ; and the plaintiff is not entitled to combine in one application proceedings for partition or sale of two farms so owned by the defendants in severalty, and the Master should not have ordered such partition or sale.

Third : That the form of order so made by the said Master is applicable to the administration and winding up of the real estate of deceased persons under the general orders of the late Court of Chancery, and is not applicable to this case, and such order should not have been made on the evidence before the said Master.

Fourth : If the plaintiff had the right to make such application to the said Master (which the defendants deny) the said Master should not have made any order thereon, except an order for the assignment to her of her dower in the said lands.

Fifth : That if the plaintiff had the right to make such application, the said Master should have ordered her to bear and pay her own costs of such proceedings, and of the assignment to her of her said dower, and the order is wrong in directing the costs to be paid out of the proceeds of the lands, or to be borne and paid by the parties according to their shares and interests in the lands.

Sixth : That the plaintiff should have proceeded by writs of summons under the Dower Act, or under the Judicature Act, for assignment of dower in the said lands.

It was also objected at the bar that the application was premature, six months not having elapsed since the death of the plaintiff's husband.

A somewhat important question arises in this matter and one which, so far as I can ascertain, has not been presented for decision on exactly the same state of facts, and resolves itself into this: Has a dowress the right under the circumstances here presented to ask for or insist upon a sale of the lands out of which she is endowed, in order that a sum of money *en bloc* may be realized and paid to her, out of these lands, as and for and in lieu of dower? After giving the subject much consideration, I have come to the conclusion that she has no such right. The policy of the law from the earliest times which governs the right to dower *unde nihil habet*, is that the widow has in the lands of her late husband, and which he held during coverture, such an *interest* as entitles her to have one-third part of such lands set out and assigned to her for her use for and during the term of her natural life, and this principle was invoked and acted upon by the Legislature, when it passed what is known as "The Dower Procedure Act" (R. S. O. ch. 55). That statute recognizes this principle, but makes provision that if under "peculiar circumstances"—mentioned in the Act—a fair and just assignment of dower by metes and bounds cannot be made, an assessed yearly sum of money, being as near as may be one-third of the clear yearly rents of the premises, after deducting any rates or assessments payable thereon, shall be made, and in doing which allowances and deductions for permanent improvements shall be made; and such yearly sum shall be a lien upon the lands mentioned in the writ of assignment, unless it is specially directed otherwise, and the same is made issuable and payable out of some specific portion of such lands, and is recoverable by distress as for rent, or by action of debt against the tenants of the freehold for the time being; but there is nothing in the Act authorizing or suggesting a sale of the whole of the lands or any part thereof, in order that a sum may be raised, to be paid and

applied in lieu of dower. The Court of Chancery, however, has, in cases of partition or sale of lands out of which dower is claimed, taken into consideration whether it may be most advantageous for the parties interested to order a sale, and the lands conveyed freed from the dower of the widow, and in such cases a sum of money equal to the value of the dowress' rights is set apart out of the sale money to be paid to her in lieu of her dower; and this takes place in cases where the lands of persons who die either testate or intestate, in whom lands were vested, subject to a right of dower, and which have not been disposed of by the deceased in severalty before his death by conveyance or devise; but no case has been cited, nor can I find one, in which a sale has been ordered where the circumstances are the same as in this, and I can see no reason for extending the rule beyond the principles which are laid down so clearly in the Act of Parliament above referred to.

This is the chief question on which this case turns, but others have arisen, and I propose to deal with each as they have been taken, and to dispose of them *seriatim*, but for convenience sake I will refer to the objection taken at the bar first, and consider the others after in the order taken in the notice of motion by way of appeal.

It is objected at the bar that the application for partition is premature, inasmuch as six months had not elapsed since the death of the plaintiff's husband before she made application or took these proceedings. And the 8th section of the Partition Act (R. S. O. ch. 101) is cited in support thereof. In my judgment that section does not apply, for the simple reason that "the lands or estate in lands to be so partitioned" were not vested in the husband at the time of his death; it was not necessary therefore that six months should elapse before the application. And it was also argued, with some force, that for that reason this proceeding cannot be taken under the Partition Act, and that plaintiff is not entitled to partition. Although a right to dower is not an *estate* in lands, yet it is an *interest* which the dowress is entitled to have set out, and assigned

to her, and consequently partitioned off from the other lands out of which she is endowed, and therefore I think the plaintiff is entitled to have partition in that sense, but I do not think, for the reasons before given, that she is entitled, under the circumstances of this case, to have a sale, and this involves the first objection taken in the notice of motion by way of appeal. The facts are very simple. There are two farms, one of 150 acres, the other of 100 acres, held in severalty by the defendants. The plaintiff, as dowress, is entitled to have set out and assigned to her, for her use during her natural life, such portion of each as will be equal to one-third of each at the time of the alienation by the deceased; that is, she is not entitled to reap the benefit of the permanent improvements made after the alienation by the husband (sec. 35, sub-sec. 2, ch. 55, R. S. O., Dower Act), or, as provided by sub-sec. 3 of sec. 35, if from peculiar circumstances, such as there being a mill, manufactory, &c., upon the lands, a fair and just assignment of dower by metes and bounds cannot be made, a yearly sum of money, being as near as may be one-third of the clear yearly rents of the premises, after deducting any rates or assessments payable thereon, shall be assessed; and in assessing such yearly sum all allowances and deductions for permanent improvements, as above provided for, shall be made.

In *Devereux v. Kearns*, 11 P. R., at p. 457, Mr. Justice Ferguson says: "I cannot avoid arriving at the conclusion, on the general question, that a person entitled to dower out of lands, though the same is not assigned, is entitled to maintain proceedings for a partition of the lands out of which she is so entitled to the dower, and in arriving at this conclusion I have not overlooked the provisions of section 32 of the Act, nor those of ch. 40, secs. 52 and 53, R. S. O., to which I was referred;" and with this I agree. In that case the partition was sought out of several parcels, three-fourths of the lands, definitely described and distinct from the rest, which the testator had devised to two persons as joint tenants, and the remaining one-fourth to another person, all sub-

ject to the dower of the plaintiff, the widow of the deceased, and it appeared that the applicant who asked for partition in that case had already the judgment, although not entered up, of another Division of the Court for her dower out of these lands. And the learned Judge then says (p. 458): "*This is all that in any view of the case she could obtain on this application*," negating her right to have a sale, which was the real object of the application in that case. Mr. Justice Proudfoot in *Lalor v. Lalor*, 9 P. R. 455, did not decide the question as to whether a dowress, as such, was entitled to apply for either a partition or sale, because, as there said by him, "in the character of tenant for life (which she was in that case, as well as dowress), she is entitled to one or the other." The right to insist on a sale in partition proceedings is not in any party, and it will not be ordered unless it is more advantageous for the parties interested; section 8 of the Partition Act (R. S. O. ch. 101); and in this case there was nothing before the Master to warrant him, in my judgment, in making the order in this form, had I concluded that there was a right to have a sale. The plaintiff showed by her affidavit that she was entitled to dower, that the defendants held the lands out of which she claimed dower in severalty, two separate farms in fact, in different concessions in the same township. It is true she could not have the whole of her dower in the two taken or assigned to her from either one of them, but that was not the fault of the defendants, and should not go to their prejudice. From all that appears it may be that the most equitable disposition of this case will be to assess the yearly value as provided in sub-sec. 3 of sec. 35 of the Dower Act, which is to be paid to the dowress out of each parcel, and that is a matter which can well be disposed of by the Master.

Then, as to the second objection. The plaintiff claims dower in two separate farms, owned by different persons, the owner of each having no interest or estate in that of the other. It is true the plaintiff is "interested in" both, but to enable her in one action to proceed against the two

owners in severalty she must shew, in my judgment, that all are interested in each parcel. I don't think it is enough that she only is interested in each. Notwithstanding the provisions of the Judicature Act in respect to parties, I cannot think that she has the right to join these two defendants in one action, or that she has brought herself within the rule in respect to joinder of parties. A similar objection was taken in *Devereux v. Kearns*, but the case went off on another point, viz., the pendency of another action, which the learned Judge held operated as a bar to the further maintenance of the proceedings. The learned Judge, however, seemed to have come to the conclusion that there was a misjoinder of parties, inasmuch as he says at p. 455: "As between the devisees of the three-fourths and the infant devisee of the one-fourth of the land there could not be a partition; because by the devises the partition is already made, the one-fourth being a parcel of land by itself, and the three-fourths being also a parcel by itself." Here these lands are held in severalty. There cannot be partition of them as between the respective owners, or terre tenants; neither has any interest or estate in the lands of the other. The dowress, however, is entitled to her dower out of each, and as between her and each owner she is entitled. I think, therefore, there is a misjoinder. This objection should therefore prevail, and unless the defendants consent to waive this objection when the order which I propose to make is being settled, I shall be obliged to give effect to it, by ordering that the name of the defendant William Fram be struck out, and that all proceedings as to the land of which he is owner be stayed, reserving to the plaintiff the right to proceed against him in a separate application.

As to the third objection; I think the order is not such an one as the facts presented before the Master warranted; and for the reasons given in this judgment, the order must be varied so as to enable the plaintiff to have partition only; and in this respect I think the order should be in terms of that made in *Bamford v. Bamford*, 5 Ha., at

p. 206, adapting it to suit the circumstances of this case, it being unnecessary to refer it to the Master to enquire as to the freehold estate out of which the plaintiff claims dower, as that is already admitted and agreed upon. The Master should assign to plaintiff her dower in each parcel, and set it out by metes and bounds, unless there are peculiar circumstances, which make it necessary to assess a sum equal to the yearly value, &c., as provided under the Dower Act, and which must govern as to costs, &c.

As to the 4th, 5th, and 6th objections :

"The Dower Procedure Act," R. S.O. ch. 55, sec. 6, declares that, "All actions of right of dower, or of dower *unde nihil habet* shall be brought and carried on according to the provisions of this Act;" and if the question were *res integra*, I should conclude that the Legislature intended in the passing of this Act to provide the form of procedure which in its wisdom it deemed the best for parties to adopt in actions of this kind, and to confine them to such procedure ; but it has been expressly decided that the Court of Chancery has not been ousted of its jurisdiction in this respect ; and although *Grieve v. Woodruff*, 1 A. R. 617, was decided long before the Ontario Judicature Act came into force, yet in my judgment the reasons given by the learned Judges in that case are sufficient to warrant me in the conclusion that it is still open to a dowress to apply, under the general orders of the Court of Chancery which are still in force, for partition. Indeed it seems to be an every day practice, although I have not noticed that this objection has been urged in any of the reported cases. It is clear, however, that the remedy and procedure under the Act is as simple and inexpensive as the one now invoked, and there is no reason why this case should not have been proceeded with either under that Act or under the Ontario Judicature Act ; but the plaintiff had the right, I think, to adopt the mode of procedure pointed out by the General Orders, so long as she confined herself to a simple partition or setting apart of her dower, taking, however, the principles laid down in

the Dower Act as the guide for the Master in assigning the dower, or in assessing an annual sum to be paid in lieu thereof; and as to the costs of which proceedings section 44 of the Act should govern.

In the case before me there was no demand of dower, nor is that necessary, but the defendants on the motion before the Master admitted the plaintiff's right to dower, and expressed their willingness to have it assigned to her, and only opposed the application so far as she claimed the right to have *a sale*, and I think she did this with the intention of unnecessarily embarrassing the defendants; and as I think it would be illegal, as well as a gross injustice, as nothing appeared before the Master to warrant me in assuming that a sale would be "more advantageous to the parties interested," which means, in my judgment, all of the parties, and not the plaintiff only, to leave it even in the discretion of the Master to say whether these defendants should be liable to have their respective farms sold, and thus perhaps inflict on them a wrong which they could never recover from, in order to enable the plaintiff to reap an advantage such as in my judgment it is clear she is not entitled to.

I am therefore of opinion that this appeal should be allowed, and that it should be referred back to the Master to assign dower to the plaintiff in each parcel, and if a just and fair assignment in each cannot be made by metes and bounds, that he assess a yearly sum of money to be paid by each during the life-time of the plaintiff, which shall be a lien on the respective lands mentioned, unless the Master direct otherwise, and make the same issuable and payable out of some specific portion of such lands, as mentioned in sub-sec. 4 of the said 35th section, and to be recoverable as by that sub-section is provided. And I think the plaintiff should pay the costs of this application, including the costs of obtaining the order, and that the costs otherwise incurred in settling the matter shall be borne as provided by the 44th section of the Dower Act.

From this decision the plaintiff appealed to the Divisional Court.*

W. R. Meredith, Q.C., for the appeal. The question is whether a dowress is entitled to take proceedings under the Partition Act, R. S. O. ch. 101, sec. 4. This is not the time to determine whether there should be a partition or a sale. It should be left to the Master to whom the reference is to determine that, when other parties, such as encumbrancers and the wives of the defendants, are made parties in his office. I refer to the following authorities: C. S. U. C. ch. 86, sec. 4; Rule 3, O. J. A.; *Devereux v. Kearns*, 11 P. R. 452; *Davenport v. King*, 49 L. T. N. S. 92; *Glass v. Glass*, 9 P. R. 214; *Grieve v. Woodruff*, 1 A. R. 617; *Moore v. Moore*, 11 P. R. 324. It is not to be presumed that the Master will make a wrong disposition. Costs at all events should not be given against the plaintiff.

R. M. Meredith, on the same side. The order of the Master was not only in Judicature Act form 172, but it also follows the provisions of the Partition Act. The Dower Procedure Act is not an Act respecting dower, but an act respecting the procedure upon a claim for dower in a common law action, and never applied to a chancery action. The order for partition or sale being rescinded, the dowress is deprived of her right to an inquiry whether a sale would be more beneficial. [BOYD, C.—Why should there be litigation when the defendants are willing that the plaintiff should have her dower assigned? There are the two Acts, the Partition and the Dower, side by side in the statute book, and they must be harmonized.] Mr. Justice Robertson misapprehended the facts; there has never been an offer to assign the plaintiff her dower. What the defendants wish to do is to force the plaintiff to proceed under the Dower Act, when she will have to pay her own costs. Section 52 of the Partition Act makes the costs payable by the parties in shares proportioned to their interests in the land, and that is a benefit of which the

* *Coram*—BOYD, C., FERGUSON and ROBERTSON, JJ.

dowress is now deprived. The main ground of the appeal to Robertson, J., *i. e.*, the right of a dowress to be an applicant for partition, was decided in the plaintiff's favour and yet she is visited with all the costs. [BOYD, C.—A dower case is not a partition case, although a dowress may have partition under special circumstances. If you repeal the Dower Act, you may have what you want.] The widow has at her election an action at law for dower, when she is bound by the Dower Procedure Act, a proceeding under the general orders for partition, and a chancery action for dower. In *Foster on Joint Ownership*, p. 110, the cases where partition is granted are cited. In *Hobson v. Sherwood*, 4 Beav. 184, no sale was ordered, but at that time there was no power to order a sale. It would be premature for the Court to determine that there should be no sale before the Master makes inquiries. I refer, also, to the statutes, 31 Hen. VIII. ch. 1; 32 Hen. VIII. ch. 32.

Hoyles, contra, was not called upon.

BOYD, C.—The best answer to the application of the plaintiff is that what she seeks is a novelty. Both the Dower Act and the Partition Act have been in force since the earliest times, and their provisions must not be regarded as contradictory. Some expressions in the Partition Act authorize the application of a dowress for partition, but I do not assent to the proposition that every dowress is to have partition. The dowress might formerly have proceeded by action at law or in Chancery to obtain her dower, and *Devereux v. Kearns* indicates that it is possible for her to proceed for partition also, but not in all cases, and in fact not in that case. Why should these men be brought in and compelled to suffer partition or sale, when dower can be assigned? If this absolute right of a dowress to partition existed we should have had widows coming in and asking for partition before now. In a case where the terre tenant is a single owner as here, it would be perfectly absurd to have a partition or sale. In my opinion my brother Robertson might have

vacated the order of the local Master without costs, but we cannot reverse his disposition of the costs; we can only say that this appeal shall be dismissed, without costs. The whole proceedings may be vacated, if the plaintiff desires it, and she may be thus left to initiate fresh proceedings in any way she pleases.

FERGUSON, J.—I agree in the remarks which have just been made. I retain the opinion I expressed in *Devereux v. Kearns* as to the right of a dowress to apply for partition, but I did not decide, nor do I think, that she can do so in every case. I agree that the possibility of her taking these proceedings does not give her the absolute right. If a number of parties were interested, and there had to be a partition, then the dowress might be the one to apply; but I don't think she should be allowed to avail herself of the Partition Act for the mere purpose of urging before the Master that there should be a sale. There is power to say that she shall proceed under the Dower Act, and this is a case in which the Court ought to say so.

ROBERTSON, J., concurred.

Appeal dismissed, without costs.

BROWN v. WOOD.

Trial by jury—Discretion of trial Judge—C. L. P. Act, sec. 255.

The trial Judge has by sec. 255 of the Common Law Procedure Act a discretion to try any case with or without a jury as he may think best, and his discretion will not be interfered with by a Divisional Court.

[June 17, 1887.—*The Chancery Division.**]

THIS was an action upon a promissory note begun in the Chancery Division. Defence: that the plaintiff had agreed that the note should not be enforced against the defendant except upon a certain contingency, and that the note was procured by fraud, and was held in trust for a defaulting partner of the defendant.

The defendant regularly filed and served a jury notice, but by mistake of an officer of the Court the case was placed upon the non-jury list at the Assizes for which notice of trial had been given and the case entered by the plaintiff. The mistake having been discovered, counsel for the plaintiff at the request of the defendant endeavoured to have it remedied by asking the trial Judge, Armour, J., to transfer the case to the jury list, which however he refused to do, stating that he had read the record and intended to try the case without a jury. This was before the jury panel had been discharged. When the case was reached upon the non-jury list, after the discharge of the jurors, counsel for the defendant moved to have the case struck out of the non-jury list, asserting his right to the benefit of his jury notice. Armour, J., then struck out the jury notice, dismissed the defendant's motion, and proceeded to try the case without a jury, whereupon the defendant and his counsel withdrew, and the trial took place in their absence. Judgment was given for the plaintiff on the evidence adduced on his behalf.

The defendant now moved to set aside the order of Armour, J., refusing to transfer the case to the jury list and

* *Coram*—BOYD, C., FERGUSON, J., ROBERTSON, J.

striking out the jury notice, and to set aside the judgment for the plaintiff subsequently given.

The defendant filed no affidavit of merits.

It was admitted that there was no equitable issue upon the pleadings.

Read, Q.C., for the motion. It was no negligence on the part of the defendant which caused the case to be put on the non-jury list. The plaintiff entered the case for trial, and he is responsible for the mistake. The defendant stands upon his strict legal right to have a trial by jury where his notice has been regularly given. If the trial Judge has a discretion as to the mode of trial, that discretion must be exercised according to law. This was eminently a case for trial by jury, and it makes no difference that it is in the Chancery Division: *Bank of British North America v. Eddy*, 9 P. R. 468; *Masse v. Masse*, 11 P. R. 81; *Pawson v. Merchants Bank*, 11 P. R. 72.

Shepley, for the plaintiff. There should be no new trial on grounds of irregularity unless the defendant files an affidavit of merits. Sec. 255 of the C. L. P. Act gives an absolute and unfettered discretion to the Judge at the trial as to the mode of trial. I have found no case here or in England in which the discretion of the trial Judge in this matter has been interfered with. In *Connée v. Canadian Pacific R. W. Co.*, 12 A. R. 744; *Temperance Colonization Society v. Evans*, 12 P. R. 48; and *McMahon v. Lavery*, 12 P. R. 62; the question of jury or no jury was practically left to the Judge at the trial to decide, and there are strong expressions of opinion that his discretion is absolute. The setting down on the wrong list was an irregularity which should have been moved against; *Leeson v. Lemon* 9 P. R. 103.

Read, in reply. As to the last argument, the defendant thought it unnecessary to move against the irregularity, as counsel for the plaintiff acknowledged it and undertook to have it set right, but was unable to accomplish it, owing to the learned Judge's refusal. [FERGUSON, J.—Will the de-

fendant pay into Court the amount of the verdict ?] The defendant is not able to do that.

BOYD, C.—The difficulty is to get over sec. 255 of the C. L. P. Act. If this were an appeal from the order of a Judge in Chambers striking out a jury notice, before the trial, the cases cited by Mr. Read would be overwhelming in his favour, but the discretion of a Judge at the trial is much larger. The Judge here refused both the applications to put the case on the jury list ; and from the first refused to try the case with a jury, instead of going through the formality of transferring the case to the jury list and then dispensing with the jury. As no affidavit of merits has been filed, and the defendant has not brought and does not seek to bring the amount of the verdict into Court, and as the motion is against a discretion that the trial Judge undoubtedly has to determine the method of trial, it should be dismissed, with costs.

FERGUSON and ROBERTSON, JJ., concurred.

Motion dismissed, with costs.

FURLONG V. REID.

Notice of motion, grounds of—Amendment.

A notice of motion to a Divisional Court against the verdict and judgment at the trial, on the ground of non-direction, should shew how and in what matter there was non-direction. The Court may allow an amendment of the notice in a proper case ; but it declined to assist the defendant by doing so where the non-direction was not material in view of other facts and findings, and the rule of law invoked by the defendant would have operated against a meritorious claim of the plaintiff.

Pfeiffer v. Midland R. W. Co., 18 Q. B. D. 243, followed.

[June 22, 1887.—*The Chancery Division**.]

THIS was an interpleader issue, arising out of a seizure of the goods of one Frederick Murphy under execution of a judgment obtained against him by Reid, the defendant in the issue, the goods being claimed by Furlong, the plaintiff in the issue, under a chattel mortgage, which he as trustee for Mrs. Murphy, the wife of the execution debtor, had obtained from the latter. The issue was twice tried ; the judgment of this Court after the first trial is reported 12 O. R. 607. At the second trial at Hamilton, before Cameron, C. J., and a jury, it was shewn that Furlong at the time he had taken the chattel mortgage was aware of the condition of Frederick Murphy's affairs, and it was contended on behalf of the defendant that the evidence shewed that Murphy was then insolvent. It was not shewn that Mrs. Murphy had any knowledge that her husband was in financial straits. The verdict of the jury was in favour of the plaintiff, and judgment was entered in accordance therewith.

The defendant now moved against the verdict and judgment, "on the ground of mis-direction and non-direction," not specifying in the notice of motion what the particular mis-direction or non-direction was.

Moss, Q.C., and *Parkes*, for the defendant. The non-direction of which the defendant complains, is, that the

* *Coram*.—BOYD, C., FERGUSON, J.

learned Chief Justice should have told the jury that, although Mrs. Murphy herself was not aware of her husband's insolvency when the chattel mortgage was given, yet she was affected by the knowledge of Furlong, her trustee.

Martin, Q.C., (*Beazley* with him,) objected that the defendant could not raise this question upon the notice of motion he had given; the particular mis-direction or non-direction should have been pointed out by the notice.

The argument was heard on the merits, subject to the objection.

BOYD, C.—The objection that the particular ground of non-direction is not mentioned in the defendant's notice of motion is well taken. It should state how and in what matter there was non-direction. The practice in England, where the procedure is, as in this Division, by notice of motion, requires this, as the latest authority on the subject, *Pfeiffer v. Midland R. W. Co.*, 18 Q. B. D. 243, indicates. There may be an amendment of the notice of motion in a proper case, but we do not think, after hearing the merits argued, that we ought to allow one here. All the cases shew that insolvency is the foundation fact to be established. It is not proved in this case that the debtor was insolvent; in fact no evidence was given of the value of his property. If he was not insolvent, it was not important that the jury should find whether Furlong knew he was insolvent or not.

The question was broadly put before the jury, and they found in favour of the honesty of the wife's claim, and that there was pressure on her part to obtain the chattel mortgage. When she had no knowledge of the state of her husband's affairs, it would be harsh to fix her with the knowledge of her trustee. The case is not such a meritorious one, having regard to the position and claim of the plaintiff, that we can help the defendant by amending his notice of motion.

FERGUSON, J., concurred.

Motion dismissed, with costs.

JOHNSON V. MOODY.

*Attachment of debts—Claimant of moneys attached—Discretion of Judge—
Rule 375, O. J. A.*

The plaintiff, after recovering judgment against the defendant, issued an attaching order upon moneys in the hands of the Canada Company, which were admittedly not the moneys of the latter, and which the plaintiff swore he was informed and believed belonged to the judgment debtor, but which were claimed by his son. There was nothing before the judge of the county court to support the assertion of the plaintiff, and the examination of the claimant taken at the instance of the plaintiff, failed to shew that there was any reason to believe that the claim was not well founded.

Held, that the judge had under Rule 375 a discretion to direct or refuse to direct the trial of an issue, and that such discretion was properly exercised in refusing to so direct and in rescinding the attaching order.

Seemle, if the plaintiff had been able to suggest even a plausible ground for supposing that it was the money of the judgment debtor, or to cast a suspicion upon the *bonâ fides* of the claim of the son, it would have been the duty of the judge to direct an issue, if the plaintiff desired it.

[June 29, 1887.—*The Court of Appeal.*]

THIS was an appeal by the plaintiff from an order pronounced by his Honor Judge Elliott, Judge of the County Court of Middlesex, on the 29th of October, 1886, discharging an attaching order and garnishee summons in this matter, under the circumstances appearing in the present judgments, and came on to be heard before this court on the 19th of May, 1887.

R. M. Meredith, for the appellant.

Aylesworth, for the respondent.

HAGARTY, C. J. O.—Unless the learned Judge of the County Court was bound at the instance of the creditor to direct an interpleader issue, as an absolute right under the statute, I see no ground whatever for our interference.

If the learned Judge were not so bound, I think his discretion was wisely exercised on the materials before him.

Moody the son was, on plaintiff's application, examined at considerable length and no ground even of suspicion is

to be found in his statements. His account is clear and unvarying. It is not the common case of a son claiming through his father the debtor. All is here claimed on his own account. This examination was on 12th October.

A week afterwards the plaintiff makes an affidavit stating that he had made inquiries, and had good reason to believe, and believed that the son was making the claim to defeat the judgment against the father.

A week further on he again makes affidavit that he is informed and verily believes that the son never owned the land as he swears, and that the age given is not correct; and that from information received and inquiry made, deponent is satisfied the son swore falsely in these matters.

During this fortnight the plaintiff had ample time and means to bring forward some facts. He could have readily had the Canada Company's lease proved, and the actual lessee discovered, to say nothing of some facts bearing on the ownership of the money in the Company's hands.

As Willes, J., says in *Newman v. Rook*, 4 C. B. N. S. at p. 440, as to a garnishee's affidavit: "The mere assertion by the garnishee that he disputes the debt amounts to nothing; there is no substantial dispute until some real answer or defence is set up."

As to the right to exercise a discretion the case usually referred is *Wise v. Berkenshaw*, 29 L. J. Ex. 240. It is there held to be discretionary in the Judge that the creditor may proceed by action against the garnishee if he dispute his liability. There is a very full discussion, and Martin, Bramwell and Wilde, BB., decide that it is discretionary with the Judge, and the former says that Channell, B., takes the same view and qualifies his language in *Wintle v. Williams*, 3 H. & N. 288. Wilde, B. says the plaintiff "has an affidavit indeed of belief of fraud, but that is not enough, for we must see whether the facts are sufficient to rouse a just and reasonable suspicion. There is here an utter absence of facts to shew it."

The next case in the same volume, *Seymour v. Corporation of Brecon*, recognises the same principle.

Re Sato v. Hubbard, 8 P. R. 445, before my brother Osler, points in the same direction.

These cases point chiefly to the garnishee disputing liability. In the case before us the garnishees in fact stand indifferent, and they could, I assume, relieve themselves by paying the money into Court; and if a proper case were made out the Judge could direct an issue between the creditors and the claimant of the money under rules 374-5 Judicature Act (p. 482-3 MacLennan, 2nd ed.)

"The Judge may order any issue on questions to be tried," &c., &c.

I am clearly of opinion that the power in all these cases is discretionary in the Judge.

I also refer to *Spencer v. Conley*, 26 C. P. 274, where Harrison, C. J., discusses the general law as it stood before the Judicature Act.

In a case complicated in its facts, in this Court, before the Judicature Act, there are the remarks of my learned brothers Burton and Patterson against the right of the County Court Judge to issue execution against a garnishee where the latter disputed his liability. But at p. 420 it is stated to be discretionary to allow the judgment plaintiff to proceed by writ: *Victoria Mutual Insurance Co. v. Bethune*, 1 A. R. 398.

I understand from the learned Master in Chambers that it has been the understanding in Chambers to consider that it was discretionary to order a proceeding by action.

I think the appeal should be dismissed.

OSLER, J. A.—The amount in dispute is small, but it involves an important question of practice. The execution creditor has taken out an attaching order upon money in the hands of the Canada Company, which is admittedly not theirs—which the plaintiff says he is informed and believes belongs to the judgment debtor—but which is claimed by a son of the latter, bearing the same

name, as being his property. Now, I think that if the execution creditor had been able to suggest even a plausible ground for supposing that it was the money of the judgment debtor, or to cast a suspicion upon the *bona fides* of the claim of the son, it would have been the duty of the Judge to direct an issue if the judgment creditor desired it. The language of the rule of Court (375) gives the Judge a discretion, but in such circumstances the discretion can practically be exercised only in one way—viz., by giving the creditor the opportunity of shewing that the fund is liable to his attachment. Here the creditor is not only unable to raise a doubt, but having examined the claimant, has merely succeeded in shewing that there is no reason to suppose that his claim is not well founded. The judgment debtor was not examined, nor any evidence produced that the son was not the tenant of the Canada Company, as he asserted. There was, in short, nothing before the Judge but the unsupported and disproved assertion of the judgment creditor; and I think the authorities which have been referred to shew that a proper discretion was exercised in refusing to direct an issue and in rescinding the order to attach.

BURTON and PATTERSON, JJ.A., concurred.

Appeal dismissed, with costs.

INTERNATIONAL WRECKING COMPANY V. LOBB.

Practice—Appeal from judgment in favor of party appealing—Subsequently proceeding on judgment—Quashing appeal.

If a party appeals from a judgment in his favour claiming relief inconsistent with that granted by the judgment appealed from, and, pending the appeal, proceeds upon the judgment and obtains the relief granted thereby, he will be deemed to have abandoned his appeal, which will be quashed at the instance of the respondent on a motion for that purpose.

[June 29, 1887.—*The Court of Appeal.*]

By a judgment of the Common Pleas Division, 11 O. R. 408, pronounced on the 6th March, 1886, it was adjudged that the plaintiffs' services alleged in the statement of claim were salvage services, and that they were entitled to be remunerated therefor as such; and that the vessel in question should be sold, one-half of the purchase money paid to the plaintiffs, their costs to be paid out of the other half, and the residue to the defendants.

On the 5th April, 1886, the plaintiffs gave notice of appeal, their contention being, that they were entitled to be paid the full value of their services, which had been fixed by agreement at \$4,000.

On the 20th April, 1886, the defendants' solicitor wrote to the plaintiffs' solicitors:

"The judgment entitles you to a sale of the vessel and one-half of the proceeds and your costs out of the other half. The water is going out of the canal, and it is likely that, unless something is done, the vessel will be further injured. As your clients have a larger interest in it than ours, we think you should interest yourselves in preventing any injury to the schooner. We shall proceed to have the judgment issued at once, in order that the vessel may be offered for sale as soon as possible, as otherwise she will have to lie as she is all season, and will be still further deteriorated."

Defendants' solicitor swore that when he wrote this letter he thought that the plaintiffs did not intend to prosecute their appeal, nothing having been done in the appeal, and the notice not having been served until the time for doing so had almost expired.

On the 14th June, 1886, the plaintiffs entered judgment, and afterwards took it into the Master's Office, where an advertisement was settled, and the vessel was sold for \$700, which was paid into Court. At the same time the plaintiffs were proceeding with their appeal, and on the 28th August, 1886, the defendants served notice of motion to quash the appeal, which came on before this Court on the 11th of May, 1887.

W. Cassels, Q. C., and R. G. Cox, for the defendants.

Moss, Q. C., for the plaintiffs.

OSLER, J. A.—In this case the defendants move to quash the appeal on the ground that the plaintiffs, having enforced the judgment appealed from, have disintituled themselves from further prosecuting the appeal.

The action is for work and services rendered and material supplied by the plaintiffs in salving a schooner belonging to defendant's testator, by getting her off shore and towing her into port, the amount demanded being upwards of \$6,000.

At the trial it was contended that the action was a salvage action, and that the amount payable to the plaintiffs for their services should be determined upon the rule acted on in such cases in the Admiralty Court, and the defendants offered to consent to a sale of the vessel, and payment of one half the proceeds to the plaintiffs in full of their claim, that being the maximum of a salvage award.

The facts and the questions for the decision of the Court were agreed upon.

The learned Judge was of opinion that the services rendered were salvage services, and that the quantum of salvage was governed by the rules of the High Court of Admiralty, and that no more than a moiety could be awarded. His judgment was affirmed by the Common Pleas Division, from whose decision the pending appeal is brought. The following are the material parts of the the judgment entered in the action.

"This Court doth adjudge, that the plaintiffs' services alleged in the statement of claim were salvage services and that they are entitled to be remunerated therefor as such.

"And this Court doth order and adjudge the schooner *Huron* mentioned in the pleadings be forthwith sold under the direction of the Master of the Supreme Court of Judicature for Ontario at St Catharines, and proceeds of such sale be paid into Court to the credit of this action, and that all proper parties do join in the conveyance as the said Master shall direct.

"4. And this Court doth further order and adjudge that one-half of the purchase money of the said schooner shall be paid to the plaintiffs in full of the amount to which they are entitled for salvage services in respect of said schooner.

"5. And this Court doth further order and adjudge that the plaintiffs' costs of this action up to and including this judgment, together with their subsequent costs (except the costs of the day incurred at the sittings at Sandwich) to be taxed, shall be paid to them out of the residue of the said purchase money and that the residue of such purchase money shall be paid to the defendants."

The judgment of the Divisional Court was delivered on the 6th March, 1886; and on the 5th of April, the plaintiffs gave notice of appeal in the usual form.

On the 20th April, 1886, the defendants' (respondents') solicitors wrote to the plaintiffs' solicitors as follows:

"The judgment entitles you to a sale of the vessel and one half of the proceeds, and your costs out of the other half. The water is going out of the canal, and it is likely that unless something is done the vessel will be further injured. As your clients have a larger interest in it than ours, we think you should interest yourselves in preventing any injury to the schooner. We shall proceed to have the judgment issued at once in order that the vessel may be offered for sale as soon as possible, as otherwise she will have to lie as she is all season and will be still further deteriorated."

The letter was not answered, and the defendants' solicitor swore that when he wrote it he thought that the plaintiffs were not sincerely intending to prosecute

their appeal, nothing further having been done, and the notice of appeal not having been served until the time for doing so had almost expired.

The appellants entered judgment in the action on the 14th June, and on the 25th June took it into the office of the master at St. Catharines. The advertisement for sale was soon afterwards settled, and on the 30th July the vessel was sold by public auction for \$700, which was paid into Court.

The appellants' reasons of appeal were served on the 23rd June, and on the 8th July, the bond for security for the costs of appeal was filed.

On the 17th August the respondents served notice of motion to quash the appeal, which was directed to stand over until the argument.

I think the motion is entitled to succeed. A party may, no doubt, appeal from a judgment in his own favor if he thinks it should have been of a different character, or is for a less sum than he had a right to demand: *Johnson v. Jebb*, 3 Burr. 1772. But the peculiarity of this case is, that notwithstanding their appeal the appellants have proceeded to execute the judgment of which they complain; and this, the two proceedings being radically inconsistent, they could not do without abandoning the appeal. By the appeal the plaintiffs seek to obtain a judgment *in personam* for the whole value of their services. The judgment appealed from gave them a remedy in rem—viz., a lien upon and the right to sell the vessel and to receive one half the proceeds and their costs out of the other half. Yet while the object of the appeal is to obtain a judgment of a wholly different character from the one appealed from, they have acted on the latter and sold the defendants' vessel under it. Having taken the remedy the judgment gave them, how can they be heard to say that it was not the one to which they were entitled?

In principle the case is the same as those in which it is held that a party who obtains and acts upon an order, is

bound by it to its full extent, as for example : *Pearce v. Chaplin*, 9 Q. B. 802, where a Judge made an order on the defendant's application, setting aside a judgment and execution, adding a direction which was objected to, that the defendant should bring no action. Having served the order on the sheriff and got back the goods seized, he moved to rescind the direction. The Court said, "Notwithstanding his protest, he takes, and avails himself of the order. We are then bound on principle to hold that he took it in its whole extent. There is no case which shews that when a party has acted upon such an order and had the full benefit of it, he shall not be bound by all its terms." See also *Hayward v. Duff*, 12 C. B. N. S. 364; and in our own Courts, *Hall v. Brown*, 3 P. R. 293, may be noticed.

Mr. Cassels cited the case of *Alexander v. Alexander*, (N. Y. Appeals) 9 Eastern Reporter p. 167. There by a judgment in an action of partition the defendant was awarded a certain proportion of the proceeds resulting from a sale ordered by the Court. After he had perfected an appeal from the judgment he accepted the proportion awarded him, and took the costs allowed him by the judgment. The Court dismissed the appeal, holding that the defendant could not be permitted at the same time to take the fruit of the judgment and appeal from it as erroneous and wrong. There the only question was as to the proportion the defendant was entitled to, but the present case is even stronger for the respondents, for although the plaintiff has not taken the proceeds out of Court, he has caused a judgment to be executed, which if wrong, would be entirely reversed and one entered of a wholly different character, under which he could not have any direct charge or lien upon the vessel. Mr. Moss contended that a party did not lose the right of appeal by acting upon an order, referring to *Masterman v. Price*, 1 C. P. Cooper 358, and cases cited in the reporter's notes. That was an appeal from two orders, the first of which had

directed certain inquiries before the Master, and the plaintiff had carried it into the master's office and brought in two "states of fact" supporting them by affidavit. The Master made a report on which a further order was made, and plaintiff appealed from both orders.

The Chancellor said he could not hold the plaintiff was shut out from appealing from the first order merely because he had accepted the enquiries offered by it, carried it into the Master's Office and acted upon it to the extent described.

So, under the former practice it has been held that an appeal will lie from an order directing an issue or directing the trial of an action at law, after the trial of the issue or action.

But cases of this kind are essentially different from the present, being merely appeals from interlocutory proceedings, which have determined nothing finally; in which the position of the parties has not been altered; and which involve nothing but a question of costs: *Butlin v. Masters*, 2 Phillips 290; and see *Keith v. Keith*, 25 Gr. 110, where it was held to be too late to rehear a decree on the ground of an improper order therein as to payment of costs, after the parties to the suit had accepted the decree and acted upon its provisions.

Then it is said that the sale was one made by consent and for the benefit of all parties concerned, and the letter of the respondents' solicitors is relied upon. Had it appeared that this letter was written for the purpose of leading the opposite party into a false position or to induce them inadvertently to take a course destructive of their appeal, we might accede to that suggestion. But if the defendants' solicitors believed as they say they did, and not altogether without reason, that it was not seriously intended to prosecute the appeal, the letter was a perfectly natural and intelligible one, as it was desirable that the vessel should be sold as early in the season as possible. And the plaintiffs do not say, and no doubt could not say, that the sale was by consent, or that they entered up

and acted on the judgment in consequence of the letter, or for any other reason than that they believed they had the right to do so.

I think the appeal should be quashed.

HAGARTY, C.J.O., BURTON and PATTERSON, JJ.A., concurred.

Appeal quashed, with costs.

MCDONALD v. FIELD.

Action—Settlement—Powers of solicitor.

The order of the Master in Chambers (9 P. R. 220) staying proceedings on the ground that the action had been settled by the plaintiff's solicitor, was reversed because the evidence shewed that the settlement was a provisional one and that the plaintiff himself had not adopted it.

[June 23, 1882—*The Common Pleas Division.*]

AN appeal by the plaintiff from the order of the Master in Chambers, reported 9 P. R. 220, setting aside notice of trial and staying proceedings in the action. The appeal was originally brought before Osler, J., in Chambers, and by him referred to the Divisional Court.

The facts appear in the former report and in the judgment of Wilson, C. J., below.

The appeal was argued on the 30th May, 1882.

J. E. Macdougall, for the appeal.

Robinson, Q. C., contra.

WILSON, C. J.—An appeal from the Master in Chambers.

The Master determined that the proceedings in the action should be stayed and the notice of trial be set aside, the suit, he was of opinion, having been settled between

the defendant and the solicitor for the plaintiff; and he ordered that the plaintiff should pay the costs of the application to the defendant.

The facts are that this action for a malicious prosecution was tried at one Court, but the jury did not agree. From some difference between the plaintiff and his solicitor and counsel, it was agreed between them that the solicitor should give notice of trial for the Assizes, in the Fall of 1881, and issue subpœnas for the plaintiff's witnesses which he did.

On the 3rd of October, 1881, the plaintiff's solicitor sent the subpœnas and copies to the plaintiff at Mallorytown from Kingston, for the then ensuing Brockville Assizes, saying, "we will attend to the entering of the action for trial in due time on receipt of the money we wrote you for in our last."

The solicitor in his affidavit states that on the 4th of October, 1881, "while still the plaintiff's solicitor, the defendant called upon me, and expressed a desire to settle the action, and I, as such attorney, agreed to settle it, as fully as I had power to do, on the terms that the defendant should pay in full settlement of the suit and the plaintiff's costs \$125, of which \$50 was then paid to me, and the balance was secured by the defendant's note at three months.

"At the time of settlement, I told the defendant the plaintiff had intimated an intention of conducting the case himself, and I had some doubt as to my authority as a matter of law fully to compromise the suit; that I would endeavour to get the plaintiff's ratification of the settlement, and I would, if I did so, give the defendant a formal receipt or release."

On the same day the solicitor wrote to the plaintiff: "You will please not serve your subpœnas, as your case with Mr. Field is not coming on at next Court. I have countermanded the trial, and have written you fully at Toronto."

The plaintiff telegraphed to the solicitor: "Why did you suspend proceedings? Write full particulars to-day."

The solicitor wrote on the 8th of October: "I have too much interest in the suit to give the matter over to you without payment of my costs, and particularly after the facts connected with the attempted settlement of the case through Mr. Phillips came to my knowledge. Mr. Field was willing to settle according to our offer or conversation at Brockville after the last trial, and I thought it more to your interest and in mine to have this done than to run any risk of another disagreement of the jury, or of an adverse verdict. We could never hope to get damages after your own account of the interview at the defendant's house, and your reason for going there, so the suit was only a question of costs, and it ought to be satisfactory to you to have it settled without your being liable to a bill from us.

"Upon my return from Brockville, I will have bill looked over, and as between us make it as liberal to you as I can."

The plaintiff on the 11th October telegraphed: "I do not authorize you to make settlement in *Re McDonald v. Field*." The solicitor, then being at Brockville, informed the defendant of the telegram, and told him if he had not authority to settle, he would return the money and note.

The solicitor on the 9th January, 1882, sent the bill of costs to the plaintiff \$131.31, writing: "As I wrote you before, I agreed to settle the case with Mr. Field for \$125, calling the costs that amount. If you ratify this settlement, I will call the balance of the bill \$100, and you can have the \$25.

If you do not ratify it, very likely Mr. Field will not be particular to insist upon it, and if not, you will be where you were at the time of disagreement of jury, and you can proceed by paying my costs of \$131.31, or what they are taxed at, if taxed. I am sorry if I misunderstood your mind on the subject, as I certainly thought on our way from Brockville your idea was to get a settlement if you could get the costs paid, so that you would have no bill to pay me. I thought then, and still think settlement preferable."

The defendant has paid the \$125. The plaintiff sent in March last \$110 to the solicitor, who returned it to him. The defendant says that after being served with notice of trial, he went to the plaintiff's solicitor and made an absolute settlement, and that the plaintiff's solicitor was afterwards to give him a document shewing the settlement.

The solicitor on the 31st of March last wrote to the defendant's solicitors at Brockville, saying: "The plaintiff repudiates the provisional settlement made by me, and yesterday I received a letter asking me to give notice of trial. I telegraphed I could not act for him. This morning I received a telegram, 'give notice of trial, and I will attend to the rest,'—so I send notice of trial for service. If Mr. Field will accept his money back and think proper to go on with the trial, it will, of course, be the easiest way, and perhaps will be the most satisfactory to Mr. Field."

I think the papers filed shew the plaintiff, if he accepted the settlement, was to give the defendant a release. The defendant admits he was to receive at the Fall Assizes, then shortly after the settlement to be held, a document shewing the settlement. That, no doubt, was a release or ratification by or from the plaintiff; or else some document from the solicitor in case his client ratified the settlement. The solicitor says he told the defendant so at the time of the settlement; and the solicitor in the letter of the 31st of March last calls it a *provisional settlement*.

Whatever authority the solicitor had to make this settlement on behalf of his client, he did not, I think, rely upon it, but settled provisionally upon his client afterwards ratifying it; and if the client did so, he, the solicitor, would then "give the defendant a formal receipt or release;" and he told all that to the defendant at the time. As the settlement was made upon that basis, and the client did not ratify it, but expressly repudiated it, it must be set aside. The order will, therefore, be that the order of the Master in Chambers be set aside, with the

costs of the application in Chambers and of the present application.

OSLER, J.—I think it plainly appears that the settlement was a provisional one only, and that the defendant took his chance of the plaintiff adopting it and executing a release.

GALT, J., concurred.

Appeal allowed.

SMITH V. CLARKE ET AL.

Discovery—Action on building contract—Examination of architect.

In an action against the trustees of an Orange Lodge for the price of work and materials in building a hall, the chairman of the board of trustees was examined, and could give no information as to the matters in dispute. His examination shewed that the architect employed by the defendants was the person from whom alone the information could be had. The defendants had successfully resisted production of the plans, as being in the custody of the architect, and belonging to him.

Under these circumstances an order for the examination by the plaintiff of the architect, for discovery only, was affirmed.

[September 9, 1887—*Rose, J.*]

AN appeal by the defendants from an order of the Master in Chambers, requiring the architect employed by the defendants in the building of a hall, in respect of which the action was brought, to attend for examination by the plaintiff, for the purpose of discovery in the action.

The facts appear in the judgment.

The appeal was argued on the 6th September, 1887.

Gwynne, for the appeal.

O'Sullivan, contra.

ROSE, J.—This action is against the trustees of an Orange Lodge, for the price of work and materials in building a hall. The cause is at issue. The defendant Clarke,

Chairman of the Board of Trustees, has been examined and could give no information as to the matters in dispute. It is, I think, a fair inference from the examination that the architect is the one from whom alone the information can be had. The defendants have, so far, successfully resisted production of the plans, as being in the custody of the architect and belonging to him.

I think the learned Master was quite justified in coming to the conclusion that unless the architect was examined, no discovery could be had from the defendants; and he made an order for the purpose of discovery only, and did not direct that the examination could be used for the purpose of evidence at the trial. See rule 285, O. J. A.

The defendants having practically appointed the architect their agent for the purpose of taking charge of the works, and accepting or rejecting the work as done by the plaintiff, and his mind being the repository of all the facts as to which the plaintiff has the right to examine before trial, the order should not be interfered with unless unsustainable.

I think it is, guarded by the provision as to not being used at the trial, quite unobjectionable, and must be affirmed, with costs in the cause to the plaintiff in any event of the cause.

RE MCKAY V. PALMER.

Prohibition—Division Court—Matter of Practice.

A motion for prohibition to a Division Court on the ground that the action was revived by the administrator of the plaintiff without serving a summons or notice on the defendant, as required by the Division Court rules, was refused, the irregularity complained of being a mere matter of practice, and therefore not reviewable in prohibition.

[September 9, 1887.—*Rose, J.*]

THIS was a motion by the defendant for an order for a writ of prohibition to the clerk of the second Division Court of the county of Kent, to restrain him from taking any further proceedings in this action on the grounds : (1) That there was now no judgment existing against the defendant. (2) That the alleged revival was of no effect, it having been obtained without conforming with the rules of the Division Court, no summons, as required, having been issued.

The affidavit of the defendant shewed that judgment was recovered on the 25th of January, 1867, in the name of one Dent as plaintiff; that it had been revived in the name of John G. McKay, as administrator of Dent, on 18th August, 1883, and that a judgment summons had been issued in March, 1887, under which the defendant had been examined and ordered to pay \$5 a month on the judgment, which was for \$86. The affidavit further shewed that, although it appeared by the records of the Division Court that the judgment was revived on the 18th August, 1883, yet the defendant never was served with any summons or notice, as required by the General Orders of the Division Court, nor was any summons issued; that the only material before the Judge was an affidavit of the plaintiff; and the order was made *ex parte*.

The motion for prohibition was argued on 6th September, 1887.

Caswell, for the motion.

C. J. Holman, contra.

The following authorities were referred to in addition to those cited in the judgment: *McKenzie v. Ryan*, 6 P. R. 323; *Siddall v. Gibson*, 17 U. C. R. 98; *Re Grass v. Allan*, 26 U. C. R. 123; R. S. O. ch. 47, sec. 7.

ROSE, J.—I think this case comes fairly within *Fee v. McIlhargey*, 9 P. R. 329, and *Re McLean v. McLeod*, 5 P. R. 467, as being a matter of practice.

If it did not I should have to consider whether lying by for nearly four years did not disentitle the defendant to any relief.

There is no merit in the application. It would have been more honest if the defendant had paid the plaintiff the money spent in making it.

The motion is dismissed, with costs,

ROSS V. THE CANADIAN PACIFIC RAILWAY COMPANY.

Venue—Preponderance of convenience—Expense.

Held, under the circumstances set out in the judgment, that the preponderance of convenience and extra expense were not sufficient to support an order changing the venue from the place proposed by the plaintiff.

Shroder v. Myers, 34 W. R. 261, followed.

[September 9, 1887.—*Rose, J.*]

AN appeal by the plaintiff from that part of an order of the Master in Chambers by which the place of trial was changed from Toronto, in the county of York, to Pembroke, in the county of Renfrew.

The action was for trespass to lands—timber limits of the plaintiffs—from which cordwood, cut by settlers, had been taken by the Murrays, third parties notified under rule 108, and sold to the railway company.

The lands in question were in the neighborhood of Lake Nipissing, on the line of the defendants' railway, neither in

the county of York nor Renfrew, but one hundred miles nearer by railway to Pembroke than to Toronto.

The solicitors for all parties were in Toronto; the plaintiff was in Quebec, but his agent in Toronto; the third parties in Pembroke.

The affidavits filed on behalf of the defendants stated that they had four witnesses in Pembroke or vicinity, one in North Bay, two in Dakota, U.S., and one in Ottawa, besides settlers where the cordwood was cut. The plaintiff's affidavits showed eight witnesses, all in Toronto or north of Toronto.

Of the witnesses on either side three or four were to be experts, and it was admitted they could be obtained equally well in Toronto or Pembroke; the defendants contended that the main questions to be tried were the local value of the cordwood and its quantity, which must necessarily be proved by witnesses from the *locus in quo*, and that a jury in Pembroke would be better qualified to weigh such evidence than one in Toronto.

The other facts appear in the judgment.

The appeal was argued on the 6th September, 1887.

W. H. P. Clement, for the appeal.

Angus MacMurchy, contra.

ROSE, J.—On the facts of this case it is not alleged that the third parties will suffer any injustice in having the case tried in Toronto, and they rely upon the preponderance of convenience and extra expense alone.

The plaintiff relies upon his *right* to bring his action on for trial at the place chosen, and a possible injustice to him if it be tried in Pembroke, where the third parties reside, and where the local interests are alleged to be, probably, adverse to the plaintiff. I do not state the facts as to this more fully, but the plaintiff makes out a possible case of influence, and the Murrys, in replying, meet the suggestion by offering to have the case tried at Ottawa.

In *Walton v. Wideman*, 10 P. R. 228, I endeavored to state the result of the authorities to that date.

Mr. Osler (in arguing the case of *Nicholson v. Linton*, post 223,) cited the case of *Shroder v. Myers*, 34 W. R. (1886) 261, in the Court of Appeal.

There the defendants applied to change the place of trial from London to Liverpool; alleging that the trial would not take place for six months if the venue was not changed to Liverpool, where they could have a speedy trial: that they had five witnesses in Liverpool who were necessary to their case, not under their control, and who might go away at any time.

To this the plaintiffs replied that the balance of convenience was with the plaintiffs, and that they could not be ready for trial at Liverpool.

The Master in Chambers, Judge in Chambers, and Divisional Court had refused to make the order.

The Court of Appeal dismissed the appeal.

Lord Esher, M. R., said. "The defendants have not brought this case within any rule of practice. * * The defendants have to shew a serious injury to their case and no injury to the plaintiffs' for having the venue changed.'

Lindley, L.J., said: "The plaintiff has the option of setting his own case down for trial when he likes. Defendants must shew some injustice and a preponderance of inconvenience for displacing the plaintiffs' right, and the defendants have no right to force the plaintiffs on to trial."

This is certainly very strong language, and when added to the previous decisions, places the plaintiff's right to retain the place of trial named by him very high indeed.

I do not think the preponderance, if any, shewn in this case is sufficient to entitle the defendants to retain their order changing the place of trial, and as to such provision the order must be varied.

The costs will be in the cause to the plaintiff, in any event.

NICHOLSON ET AL. V. LINTON.

Venue—Preponderance of convenience—Expense.

Held, under the circumstances set out below, that the defendant would be put to an undue and disproportionate inconvenience and expense if the action were tried at the place proposed by the plaintiff: that there was a very great preponderance of convenience in favour of the place at which the defendant sought to have the trial, and the venue was therefore changed.

Shroder v. Myers, 34 W. R. 261, distinguished.

[September 9, 1887.—*Rose*, J.]

AN appeal by the plaintiffs from an order of the Master in Chambers, changing the place of trial from Cornwall to Berlin.

The action was to recover the price of a quantity of steel; the principal defence being inferiority in the quality of the steel.

The plaintiffs resided in England, and their agent in Canada resided at Montreal. The defendant resided at Galt, which is fourteen miles from Berlin, and all the defendant's witnesses, six in number, resided there, and the cause of action arose there. The steel had been delivered in Galt, and a test made there in the presence of the plaintiffs' agent, in Goldie & McCullough's factory. The plaintiffs named no witnesses except the agent before mentioned; but after notice of application to change the place of trial had been given, the agent directed one bar of the steel to be sent to Montreal to have a test made there, and then in answer to the application swore that he would have to call experts from Montreal to prove the result of the test. The defendant swore that the expenses of his witnesses, if the case were tried at Cornwall, would be probably \$135, but if tried at Berlin only about \$14.

The Master changed the venue to Berlin, and the plaintiffs appealed.

The appeal was argued on the 6th September, 1887.

Osler, Q.C., for the appeal.

C. J. Holman, contra.

ROSE, J.—The facts make this case entirely dissimilar to any case which I have seen, so far as they bear upon the question now before us.

The plaintiffs residing in England, their agent in Montreal sells goods to the defendant at Galt—delivers the goods there, attends at Galt for the purpose of endeavoring to arrive at a settlement of the dispute between them—is present at a test made at Goldie & McCullough's in Galt—brings an action, naming the place of trial at Cornwall, without having a witness save himself in or near Cornwall—and, after the application is made to change the place of trial, directs one bar of the steel be reshipped from Galt to Montreal to have tests made—and then says generally that it will be necessary to call experts from Montreal to prove the result of the test, but does not say how many.

The agent says that the tests require his personal supervision, and hence must for convenience sake be made in Montreal.

The learned Master came to the conclusion that the agent was, during the time occupied by enlargements of the motion before him, endeavouring to make evidence to answer it, and I am not able to say that such conclusion was without evidence to support it.

I am not at all convinced that quite sufficient tests can not be made in Toronto, Hamilton, or any town where skilled men can be found, and I think it would, under the circumstances, be manifestly unfair to allow the agent to drag the defendants and their witnesses from Galt to Cornwall, away from their businesses, to attend a trial at Cornwall.

Nothing appears to shew that a fair trial cannot be had at Berlin, as well as at Cornwall, and it seems to me that this is a clear case where the "very great preponderance of convenience" is in the defendant's favor.

The case of *Shroder v. Myers*, 34 W. R. 261, is referred to in my judgment to-day in *Ross v. The Canadian Pacific R. W. Co.*, ante p. 220. We have not, in this case, to consider any injustice arising out of the trial either at one

place or another, but merely such injustice as may arise by reason of one party or the other being put to an undue and disproportionate inconvenience and expense.

I think the learned Master has arrived at quite the correct conclusion, and affirm his order, with costs in the cause to the defendant in any event.

WARD ET AL. V. JACKSON.

Notice of trial—Remanet.

Where a case has been made a *remanet* at the Assizes, a notice of trial for the Chancery Division Sittings is irregular.

[September 16, 1887.—*The Master in Chambers.*]

MOTION by the defendant to set aside the plaintiffs' notice of trial for the Autumn Chancery Division Sittings at Lindsay, the case having been first set down for the Spring Assizes at that place, and there made a *remanet*.

Aylesworth, for the motion.

J. M. Clark, contra.

THE MASTER IN CHAMBERS.—I must set aside the notice of trial in this cause before the Chancery Sittings. At the last Assizes the cause was entered for trial, and is a *remanet*. It is still remaining for trial at the Assizes, and neither party can interrupt the course of that trial, without the consent of the other party or the leave of the Court. I refer to Rule 170 (b.) and to Rule 171.

The old practice will appear, in such a case, in *Adams v. Grier*, 3 P. R. 269.

I set aside the notice of trial, with costs.

HILLYARD ET AL. V. SWAN.

Judgment, setting aside—Security—Execution.

The plaintiffs signed judgment on default of appearance in an action for a money demand, and the defendant was afterwards, upon application to a local Judge, let in to defend upon the merits, upon certain conditions, one of which was, "the judgment and execution (*fi. fa.* goods) now in force to stand as security to the plaintiffs unless and until the defendant pays into Court the amount of the plaintiffs' claim, or gives security therefor." The defendant did not pay into Court or give security. The action was tried and a verdict given for the plaintiff; subject to a reference to ascertain the proper amount due to the plaintiffs; and the referee found a less amount due than that for which judgment had originally been entered. After verdict and before the finding of the referee, the plaintiffs issued and delivered to the sheriff a *fi. fa.* against the lands of the defendant on the original judgment.

Semble, the original judgment could not stand when the case was reopened, and the defendant let in to defend; but as the parties had treated the judgment as standing,

Held, that it and the *fi. fa.* goods should be reduced to the sum found by the referee, instead of entering a new judgment; but that the issue of the writ of *fi. fa.* lands was quite unwarranted.

[September 16, 1887.—Wilson, C. J.]

CASE referred by his Honour the Judge of the County Court of the united counties of Leeds and Grenville, as Local Judge of the High Court of Justice, under rule 426 of the Judicature Act.

The facts stated were in effect as follows: Judgment was signed by the plaintiffs on the 16th March, 1887, against the defendant for default of appearance, for the amount of his debt sued for, being \$290.47 and interest and costs; and upon application of the defendant after hearing the parties, an order was made by the local Judge that the defendant "be allowed in to defend this cause upon the following terms: she to pay the costs of this application; the judgment and execution now in force to stand as security to the plaintiff, unless and until the defendant pays into Court the amount of the plaintiffs' claim, or gives security therefor to the satisfaction of the proper officer. The issue between the parties is to be disposed of at the ensuing Spring Assizes, and upon the trial of the issue the furnishing of the goods charged is to be admitted, and the issue to be tried is whether the

defendant is liable for the payment of the price of said goods ; defendant undertakes not to attempt to avoid payment on the ground that she was a minor when the goods were furnished. Dated 12th April, 1887."

The defendant did not pay into Court, or give security, or pay the costs ordered.

At the Spring Assizes the following consent was endorsed on the record—"By consent" [the case stands] "to be tried at the next Sittings of the County Court for these counties, in June next, costs to be costs in the cause."

At the June County Court Sittings the action was tried, when a decision was on the 16th June given for the plaintiffs for the full amount of their claim subject to be reduced to such sum as Mr. Reynolds, the clerk of the County Court, should find, "and the order as to the judgment, &c., remaining as security was continued." The referee found the amount the plaintiffs were entitled to was the sum of \$107.28.

After the Judge of the County Court had found the full amount claimed in favour of the plaintiffs, and before the finding of the referee, the plaintiffs issued a *fi. fa.* against the lands of the defendant on the original judgment, and delivered the same to the sheriff.

The execution which had been issued at the time the original judgment was signed was against goods, upon which the sheriff had seized, and upon which seizure an interpleader issue was ordered to be tried, which was disposed of at the County Court.

The statement of facts of the learned County Court Judge to the Judge in Chambers under the rule, was as follows :

"On the 13th of July, 1887, the parties, on the application of the defendant, appeared before the local Judge :

"1st. To reduce the judgment herein rendered at the trial for the full amount of claim to the amount fixed by the referee.

"2nd. To settle the question of costs.

"3rd. To set aside the writ of execution against lands above referred to.

"The local Judge having decided the first two points, a question arose as to whether the judgment already recovered by default should stand, and a suggestion be entered or other amendment made to meet the present facts, or whether a new judgment should be entered."

The local Judge has referred the third point, and also the questions whether the judgment for default should stand, and a suggestion or amendment be made upon the roll to meet the present state of facts; or whether a new judgment should be entered.

The case was argued by *Walter Read*, for the motion and by *Shepley*, for the plaintiffs.

WILSON, C. J.—The local Judge has decided, he says, whether or not he should reduce the judgment to the amount fixed by the referee, and also in what manner the question of costs should be settled. He has not said in what manner he has decided these matters. They are not therefore referred by the order he has made transferring the matter to a Judge of this Court.

The first question I am to consider is, whether the original judgment by default is to stand, and a suggestion or an amendment be made to meet the facts of the present case; or whether a new judgment should be entered.

The order, drawn as it is, is, that "the judgment and execution now in force are to stand as security to the plaintiffs, unless and until the defendant pays into Court the amount of the plaintiffs' claim, or gives security therefor." The word "unless" entitled the defendant to treat the judgment and security as a substitute for either payment of the amount of the claim, or giving security for it; and so both parties have treated it. But that is not properly consistent with the defendant being allowed in to defend the action while there is a judgment and execution against goods, and a seizure under that execution is standing against the defendant.

I do not know of any case in which a party is allowed to try the merits of an action, in which action there is a final judgment standing against him.

The action has been stayed on the bail bond, upon the bail putting in and perfecting special bail or depositing money in lieu of it, and the bail bond has, in some such cases, been ordered to stand as a security for the recovery which might be had against the defendant on the original action. So, in ejectment upon a judgment against the casual ejector, even when the possession has been changed under that judgment, the landlord of the tenant in possession has been, after that change of possession, allowed in to defend without the claimant being ordered to give up the possession he had obtained: *Doe dem. Ingram v. Roe*, 11 Price, 507. That would be similar to the plaintiffs in this action, having made the money on the execution, being allowed to retain it on the condition of the judgment and execution in the original action being set aside, and the action proceeded with subject to repayment of that money or such part of it being made to the defendant according to the result of the action; in such a case to enable the action to be tried the judgment would have to be set aside.

In *Doe dem. Troughton v. Roe*, 4 Burr. 1997, the real party was let in to defend after a judgment against the nominal party or casual ejector, but the judgment was set aside for the purpose of letting in the real party to defend.

The rule to be observed in setting aside regular proceedings, is to put the party in the like position so far as possible as he would have been in if the proceedings had not been set aside: *Anon.*, 3 Dougl. 431; *Smith v. Blundell*, 1 Chit. R. 226; *Picker v. Webster*, 1 Chit. R. 232: and the applicant will be put upon all reasonable terms. If a judgment and execution be regular, and be set aside, the party against whom the judgment has been entered will be restrained of course from bringing any action against the party who gets relief: *Cannan v. Reynolds*, 5 E. & B., per Crompton, J., at p. 303.

In that case, without stating the merits of it, Lord Campbell, C. J., said : " It is not disputed that a defendant may, after execution has been executed, apply to have the judgment set aside on terms of paying all costs and placing the plaintiff in the same situation as if there had been no mistake made, and that orders to that effect are constantly made."

There the plaintiff had his own judgment set aside, and was allowed to amend his particulars of demand on payment of costs, on the ground of a mistake which he had made in these particulars to the knowledge of the defendant, who sought to take advantage of it. A collateral proceeding might be ordered to be instituted between the parties to determine the subject of dispute, leaving the original judgment to stand, subject to be amended by the result of that collateral issue, but I do not think, as I have said, the Judge could allow the judgment to stand, and yet re-open the case and let in the defendant to defend it upon the merits.

The parties have, however, treated it as a case in which that could be done, and in which it has been done, and the words " that the judgment and execution stand as a security unless and until," &c., have led the parties to interpret the order as directing that the judgment might remain and yet be re-opened and contested by the defendant.

If I set aside the judgment and execution and require a new judgment to be entered against the defendant upon the final ascertainment of the debt by the referee, I may be doing an injustice to the plaintiffs by depriving them of the levy under the execution against goods ; with respect to which goods an interpleader issue was ordered and tried, and it is said the claimant succeeded as to part of the property ; but how the rest of the goods were disposed of I do not know. If it was against the plaintiffs no injustice can be done to them, but if for them they may be deprived of the benefit of that finding.

With respect then to the judgment, both parties have treated it as a valid, binding judgment, and I am unwilling to disturb it.

It ended in effect as upon an arbitration, and I think I shall be doing full justice to the parties by directing the judgment entered to be reduced in amount to the sum found by the referee, and that the costs be made to conform to the amount settled by the local Judge; and that the execution or executions against goods be amended so as to correspond with the amended judgment.

But I must set aside the execution against lands issued after the order of the local Judge was made. For under that order the judgment was to stand as security, and the cause of action was to be tried, and the plaintiffs had no more power to issue a writ against lands in such a state of things than to move for a *ca. sa.* upon the judgment. The defendant was let in to try the claim upon the merits; and it was quite unwarranted on the part of the plaintiffs to charge the lands of the defendant for a sum which had still to be adjudicated upon.

I must, therefore, set aside that execution, with costs to be paid by the plaintiffs; and I must refuse costs to both parties upon all proceedings taken since the finding of the referee; and I direct that no action shall be brought by the defendant against the plaintiffs or any one acting for or under them in respect of anything done upon any execution before or since the order of the learned local Judge, dated the 12th of April last.

FAWCETT V. WINTERS.

Referee—Report—Effect of—Reasonable and probable cause—Evidence.

The report of a referee is equivalent to the verdict of a jury. It should state the referee's conclusions; and he need not give the reasons for his findings.

The referee, who was a barrister, found that there was a want of reasonable and probable cause for the defendant proceeding criminally against the plaintiff. It was objected that it was a finding of law and not of fact.

Held, that this was equivalent to a verdict for the plaintiff rendered by a jury under instruction by a judge of what would be evidence of want of reasonable and probable cause; and on the evidence the findings could not be interfered with.

[June 9, 1887.—O'Connor, J.]

A MOTION by the plaintiff for judgment upon the report of a referee, to whom the action was referred by an order under sec. 47, O. J. A.; and a cross-motion by the defendant to set aside the findings and report.

The motion was made before a Judge in Court, and argued on the 7th of June, 1887.

H. J. Scott, Q. C., for the plaintiff.

C. J. Holman and *Birnie*, for the defendant.

O'CONNOR, J.—I think the motion to set aside the findings and report of the referee herein must fail, and the motion for judgment thereon must prevail.

The report is equivalent to the verdict of a jury. The report should state the referee's conclusions, and he is not bound to give reasons for his findings: *Miller v. Pilling*, 9 Q. B. D. 736.

The evidence was conflicting; and I presume the verdict of a jury on the issues of fact, had they been tried by a jury, and under proper direction of the trial Judge, could not be successfully assailed.

It is urged in argument by the defendant's counsel, that the referee's finding of want of reasonable or probable cause for the defendant's proceeding criminally against the plaintiff, was a finding of law and not of fact, although

the reference was only of issues of fact. But I take that to be equivalent to a verdict for the plaintiff, rendered by a jury, under instruction by a Judge of what would be evidence of want of reasonable and probable cause.

I think a referee, while he performs the function of a jury, has in a measure to perform for himself the function of a Judge also: he must direct himself as to what is evidence of want of reasonable and probable cause.

No doubt, if the evidence did not warrant such a finding, it might be set aside as the verdict of a jury would be set aside for that reason. The referee has reported the evidence on which his findings are founded, and I take it that the evidence so reported may be read as part of his report. And looking at the evidence having reference to this part of the report, I cannot say that the finding of want of reasonable and probable cause is not sustained.

I even think that, though the evidence on that point, as well as on most other issues in the action, is conflicting, the preponderance of evidence is in favour of the referee's finding.

The referee in this instance is a barrister, and may be presumed to be competent to direct himself in matters of law in so far as was necessary respecting the issues referred to him, and he was probably chosen with that view.

He appears to me, by his findings, to have shewn discrimination and sound judgment.

The motion to set aside the report is refused, with costs; and the motion for judgment to be entered on the report is allowed, with costs.

KELLY v. WOLFF.

Landlord and tenant—Ejectment—Title of landlord, expiry of—Bonâ fide defence—Ejectment Act, secs. 65, 66.

In an action of ejectment by a landlord against a tenant whose term had expired,

Held, that the defendant was not precluded from setting up that the plaintiff's title expired or was put an end to during the term; and to raise such defence it was not necessary for the tenant to go out of and then resume possession.

Secs. 65 and 66 of the Ejectment Act do not apply where a *bonâ fide* defence or dispute is raised; and in this case a motion by the plaintiff for security for damages and costs, under these sections, was refused, reversing the decision of the Master in Chambers.

Quære, whether secs. 65 and 66 would apply to any case where the tenant actually gives up possession, so that the landlord is in possession, and then retakes.

Held, *per* the MASTER IN CHAMBERS, that it is not now necessary for the plaintiff to sign the notice under sec. 5 of the Ejectment Act, requiring the defendant to give the security sought.

[June 14, 1887.—*The Master in Chambers.*]

[September 9, 1887.—*Rose, J.*]

AN action of ejectment by a landlord against a tenant who had quitted and resumed possession in the manner set out in the judgment of the Master in Chambers, below. The plaintiff claimed title under a conveyance from one Frederick Sparks, deceased, and the defendant, who was the sister of Frederick, defended on the ground that Frederick's estate in the lands in question, and therefore the plaintiff's, determined on the death of his mother, Sarah Sparks, and that defendant and others, from whom she had obtained conveyances, then became entitled.

This was a motion by the plaintiff for security for damages and costs under sections 65 and 66 of the Ejectment Act.

The motion was argued before the Master in Chambers on the 11th June, 1887.

Allan Cassels, for the plaintiff.

Aylesworth, for the defendant.

THE MASTER IN CHAMBERS.—Ejectment by a landlord. Motion by the plaintiff to compel the defendant, who has

appeared, to give security under sections 65 and 66 of the Ejectment Act.

The lease to the defendant from the plaintiff is for a year, which has expired by effluxion of time.

The points of irregularity which have been taken to the plaintiff's material on this motion, seem to me entirely unfounded, except one, which I proceed to notice. It is that the notice requiring the defendant to give the security sought, if ordered by the Court, under section 5 of the Ejectment Act, is not signed by the plaintiff, the landlord. Such is the fact; it is not signed, and a case is cited to me, 1 D. & R. 435, *n.*, where C. J. Abbott and Bayley, J., decided that the notice must be signed by the landlord himself and not by Richard Roe, in order to give the landlord the benefit of that statute. The statute then in force was 1 Geo. IV. ch. 87; and in respect of the present matter, its words were, "It shall be lawful for him," (the landlord) "at the foot of the declaration, to address a notice to such tenant"—(the notice now referred to.)

The form of the action of ejectment then prevailing, it is important to observe, was the old form of John Doe and Richard Roe. A short way to describe it will be to state the proceedings that would take place in this action, if it were now governed by that old practice. Kelly would sue not in his own name, but in the name of John Doe, who, by a fiction, would be supposed to claim title by a lease from Kelly, the real plaintiff, and he would sue not Wolff, the real defendant, but Richard Roe; and the first step in the action would not be the issue of a writ, but the delivery of a declaration to the tenant Wolff in the name of John Doe as plaintiff in a plea of trespass and ejectment—complaining that Richard Roe had with force and arms entered on John Doe's possession of the land under the lease from the plaintiff, and had forcibly ejected John Doe from it, who therefore brought his suit.

Underneath this count, in a new paragraph, was written a letter from Richard Roe to the real tenant in possession, Wolff, stating that he, Richard Roe, understood that

Wolff claimed possession, and that he Richard Roe had no interest, being sued as a casual ejector only, and he advised Wolff, the tenant; to appear next term and have herself made defendant in his, Richard Roe's stead, for he intended to let judgment go by default, and thereupon the tenant Wolff would be turned out of possession.

That letter so written under the declaration was signed by Richard Roe, and they were both served upon the real defendant, the tenant.

Now it will be apparent why the decision in 1 D. & R. upon the words of the statute 1 Geo. IV. ch. 87, was come to. That statute did not expressly require the notice to be signed by the plaintiff any more than our statute, but the notice, under the words of the Act, had to be from the landlord, and therefore must not appear as merely appended without any apparent authority to the letter of Richard Roe, which was always directly under the declaration, and so to make all distinct and clear, therefore, the notice had to be signed by the landlord.

These are substantially the reasons given for the decision by the Court. Then this first process, the declaration and letter, did not of themselves contain the name of the plaintiff at all as a complainant.

But this old proceeding has long since been changed. The first process is now a writ, and in the Ejectment Act, R. S. O. ch. 51, sec. 5, notices are directed to be given of the title to be set up by the plaintiff to be attached to the writ. No one ever thought *that* notice from the plaintiff had to be signed by the plaintiff. Then there is the Judicature Act. As to ejectment writs, and all other writs of summons, notices are prescribed as to all of them, notices to be given by the plaintiff, but no one ever thought that the plaintiff was required to sign them; nor is it the practice for any one to sign them for him, they are simply written on the writ. The whole writ is now addressed to the defendant by the authority of the plaintiff.

The words of our present statute are, that the landlord may, in such a case, at the foot of the writ in eject-

ment "address a notice to such tenant or person, requiring him to find such bail if ordered by the Court or a Judge." Now, what is required by those words? 1. That the notice should be in writing, else it could not be at the foot of the writ, or be addressed; 2. That it must be addressed to the tenant. That is all, as it seems to me, that the words of our statute require; that it is required to be signed by the plaintiff or any one, I do not think, any more than any other notice that the plaintiff is required to endorse upon the writ of summons. The reason why it was thought necessary under the old practice, and the 1 Geo. IV. ch. 87, was pointed out by the Court, but does not now apply. This is a verbatim copy of the notice on the writ in this case, written just after the notice of the plaintiff's general claim in the action. It is not signed.

"To the said defendant, Esther Wolff:

"Take notice that you are hereby required, if ordered by the Court or a Judge, to find bail and enter into a recognizance by yourself and two sufficient sureties within such time, and in such amounts as such Court or Judge shall fix, conditioned to pay the costs and damages which shall be recovered by the plaintiff in this action."

I think that is a good notice under the Act, and I cannot see what higher sanction would be given to it, if it were signed by the plaintiff. It is notorious that every thing in that writ is authorized by the plaintiff, and *he* is every day held responsible for it, and the statute no where requires the plaintiff's signature.

Then the defendant says she is in possession, not under the lease, but under a claim of title quite independent of the lease; that on the 4th May, the lease having expired on the 1st, she delivered up possession to the plaintiff, and removed all her goods, and went herself off the premises. Next morning, about ten o'clock, she says she found one of the doors open and re-entered into possession. She does not say, if she knows, who opened the door. The plaintiff says that on the previous evening he had caused the doors and windows to be nailed up. But what did she there the

next morning? It is useless to endeavour, by any form of swearing, to conceal that this re-entry was premeditated. Her whole case that she puts forward herself, shows that it was—she being, as she thinks, an heir of Frederick, got to herself conveyances of the rights of the other supposed heirs. But it is important in the law that the real distinctions between a person who is really a plaintiff and a person who is really a defendant in ejectment, should be preserved, in trying their rights. I regard this as a mere trick to gain an advantage, and I think she is now overholding under that lease.

In showing her case, the defendant, to make out that she is entitled, has quoted some of the provisions of her father's will. It is not for me here to decide anything about it, but she seems to me to show that the plaintiff has a good title.

The following cases and references will show by analogy the view which is and ought to be taken by the Court of such fraudulent attempts: *Doe dem. Pitcher v. Roe*, 9 Dowl. 971; *Doe dem. Lloyd v. Roe*, 2 Dowl. N. S. 407; *Tidd*, 9th ed., 1247.

The defendant appealed to a Judge in Chambers, and the appeal was argued by the same counsel on the 6th September, 1887.

ROSE, J.—It seems to me clear that the defendant is endeavouring to have determined her right under the will, and is not overholding perversely, and without some shew of right.

Her contention appears to be, that Frederick having predeceased his mother, his heirs came in under the terms of the will as persons named, and that the title of the plaintiff was at an end immediately upon the death of the mother, he claiming under a deed from Frederick.

As I understand it, a tenant in possession after the expiry of the term, is not precluded from setting up as against the landlord that the landlord's title expired, or was put an end to during the term.

To raise the defence set up here as above indicated, the defendant need not have gone out of possession.

But I do not think the statute was intended to apply to a defence raising *bonâ fide* a matter of dispute as to the plaintiff's title.

One of the earliest cases, and in fact the only one in point which I have found in the brief time at my disposal, is *Doe dem. Sanders v. Roe*, 1 Dowl. 4, where Littledale, J., said: "I do not think that this case comes within the statute. The tenant in possession swears he holds as heir-at-law. *There is a dispute, therefore, as to the title. The statute was intended to apply to cases where the title of the landlord was clear.*"

There is much force in Mr. Aylesworth's argument that the provision as to bail is hardly applicable to the present practice.

When it was enacted, a defendant in ejectment by entering an appearance could keep the landlord out of possession for possibly months, even without any shadow of defence, and the provision in question may have been to prevent the injustice arising from such a course. Now the whole practice is changed, and with the means of obtaining speedy judgment but little injustice can be done to a landlord by an attempted defence for time without merits.

I rest my decision on the ground that the question raised by the defendant as to the expiry of the landlord's title by an act, or the happening of an event, during the term, which, as the defendant claims, gave her title, could be raised by a tenant in possession.

And second, that the statute was not intended to apply where a *bonâ fide* defence or dispute is raised. I, of course, express no opinion as to the validity of the plaintiff's claim.

I am not clear that when the tenant actually gives up possession, as was done here, so that the landlord was in possession, and retakes possession, the statute would apply. It not being necessary to determine that question, I say nothing more as to it.

The provision, so far as I have any knowledge or information, is one not frequently invoked, and should, I think, be sparingly put in operation.

The appeal must be allowed, with costs.

RE MOFFATT, A SOLICITOR.

Solicitor—Delivery of bill to third party—Right to taxation—Præcipe order.

Upon the application of a mortgagor the mortgagees' solicitor was ordered, by a County Judge, to deliver to the applicant a copy of the bill of costs of a sale under the power in the mortgage; and the bill was delivered pursuant to the order.

Held, that although the delivery was, under sec. 45 of the Attorneys' Act, to be regarded as for the purposes of a reference to taxation, yet the person so obtaining the copy of the bill had not necessarily the right to tax the bill; and a *præcipe* order for taxation was set aside, where at the time of making it there were two matters in dispute, viz., whether payment as such had been made by the mortgagees to the solicitor, and whether the mortgagees had precluded themselves from the right to tax the bill.

[September 13, 1887.—*Ferguson*, J.]

APPEAL by the solicitor from an order of the Master in Chambers refusing to set aside a *præcipe* order for taxation of a bill of costs, delivered by the solicitor under the circumstances set out in the judgment; and a cross-motion by the respondent for a proper order for taxation, if the appeal should be successful.

Hoyles, for the solicitor.

E. Douglas Armour, for the mortgagor.

FERGUSON, J.—Mr. Moffatt is solicitor for the Chatham Loan and Savings Company. This company held a mortgage upon real estate. Solomon Cornell, the present respondent, was the mortgagor. Exercising the power of sale contained in this mortgage, the company sold the lands, Moffatt acting in the proceedings for such sale as

their solicitor. The amount of the mortgagees' claim seems to have been \$1406.80. The amount of the costs of the sale as charged seems to have been \$104.81. The amount of the purchase money was \$1550, to which was added \$25 derived by the mortgagees "from other sources," and upon these figures there appears to have been a balance in favor of the mortgagor, or whoever might be entitled to the balance or surplus of \$63.39.

It does not appear that there was any taxation of the solicitor's bill of costs by the mortgagees. The mortgagor (Cornell) being dissatisfied with the amount of the solicitor's costs, applied as a person not being the party chargeable, and as it would appear under the 45th section of the Act, ch. 140, R. S. O., to the Judge of the County Court of the county, and obtained a copy of the bill by order of the Judge. An application was made for a writ of prohibition to prevent or prohibit proceedings upon or in respect to such order or copy of the bill, which application was refused.* An application was then made by the mortgagor (Cornell) to the same Judge of the County Court for an order of reference to tax the solicitor's costs, upon the copy thereof obtained as aforesaid; when the learned Judge (as counsel said) preferred that the application should be heard before the Master in Chambers in Toronto, as he (the Judge) was, or had been, president or some other officer of the company, the mortgagees.

The mortgagor (Cornell) instead of renewing the application before the Master in Chambers in Toronto, as suggested by the learned Judge, applied to the Deputy Registrar at Chatham for and obtained (on *præcipe*) an order of reference of the bill for taxation by the Local Master at Chatham. This order bears date the 11th day of June last. It was said that notice of the application for this order was given, and as evidence of the fact a letter of the same 11th day of June is referred to. As I understand the matter, this letter was not sufficient notice, if any notice were at all necessary or appropriate in making such

*See 7 C. L. T. 297.

an application, and I think such an application is in its nature and according to the practice *ex parte*.

A motion was made on the 14th day of June last before the Master in Chambers in Toronto on behalf of the solicitor (Mr. Moffatt) for an order setting aside the above-mentioned *præcipe* order for taxation. This motion was refused by the learned Master, and from his decision in refusing it is this appeal.

There was a cross-motion before the learned Master for a proper order of reference for the taxation of the bill in case he should be of the opinion that the *præcipe* order should be set aside, and this cross-motion is continued before me, if I should be of the opinion that the appeal should be allowed and the *præcipe* order set aside.

I am of the opinion that the order made by the learned Judge of the County Court of the county of Kent on the 16th day of May last (before referred to) for the delivery by the solicitor to the mortgagor of a copy of the bill of costs is final and conclusive down to that date. This order was no doubt made under the provisions of the 45th section of the Act, which section says: "For the purpose of any such reference * * the Court or Judge may order the attorney or solicitor * * to deliver to the party making the application a copy of the bill upon payment of the costs of the copy." The copy of the bill was delivered pursuant to the order. The delivery of it was, as would seem by the provisions of the section, for the purposes of a reference (to taxation), but this is not saying that the person so obtaining the copy of the bill has necessarily the right to a reference of the bill to a taxation. There may, I think, nevertheless, be good and sufficient reasons why he should not have the reference. In the case *Re Macdonald, Macdonald, and Marsh*, 8 P. R. 88, Mr. Justice Proudfoot, in considering the 43rd section of the Act, says, (p. 90): "If the mortgagee have precluded himself from taxing the bill, the mortgagor, who is to stand simply in his place, cannot do it." And further on the learned Judge says that if the mortgagee has paid the solicitor

more than he ought to have done, the only remedy the mortgagor has is by a bill for an account. In the argument of the appeal before me it seemed to be conceded that if there had been payment as such by the mortgagees, there being no "special circumstances" available to them, they could not have a taxation of the bill, and if they could not then according to *Re Macdonald, Macdonald, and Marsh*, above, the mortgagor could not have the taxation he contends for. The question as to whether such payment had taken place or not was much debated.

In the case *Re Malcolmson and Wade*, 9 P. R. at p. 244, the Chancellor says: "The solicitors were paid their costs more than a year before this application, but did not then or at any time deliver any bill to the agent of the mortgagee (who was out of the jurisdiction), but merely retained out of the proceeds of sale in their hands a lump sum, with the sanction of their client's agent. This is, I think, a special circumstance, which, as between the solicitor and third parties, may be considered under sec. 44"; referring to *Re Blackmore*, 13 Beav. 154.

Mr. Moffatt, the solicitor, in his affidavit says that he was paid the amount of the bill by the manager of the mortgagees' company, who appeared to be perfectly satisfied with the charges made for the services which he had rendered, and that the matter was finally closed.

Mr. Stone in his affidavit says that he attended at the office of the company, the mortgagees, and obtained the paper D., a short statement of the mortgage account, upon receipt of which he asked for particulars of the item of costs of sale, whereupon the manager of the company replied to him that the company had nothing whatever to do with the costs; that the costs had not been paid by them, and that they (the costs) were a matter entirely between the solicitor and the mortgagor, and for which the solicitor was responsible, and the deponent pledges his belief (which I apprehend was founded mainly upon what he had learned from the manager of the company) that the bill was not paid to the solicitor, but that the amount

was deducted by the solicitor out of the purchase money paid to him.

At the time the *præcipe* order for taxation was made it appears that there was, at least, one matter of fact in dispute, viz., as to whether or not payment as such had been made by the mortgagees to the solicitor, or whether what occurred was not a mere retention by the solicitor of a sum of money out of the purchase money as and for his costs, the mortgagees caring little about it so long as there was money enough to satisfy their claim upon the mortgage, and, also, the question of law (depending upon the state of facts) as to whether the mortgagees had precluded themselves from the right to tax the solicitor's bill had they chosen so to do.

The case *Re Fitch*, 2 Ch. Chamb. R. 288, seems to decide that an order to tax a solicitor's bill is not to be granted *ex parte*, on the application of the solicitor, where there appear to be any facts in dispute between him and his client. By Rule 444, Judicature Act, the order when grantable "of course" shall be issued on *præcipe* by the registrar, &c.

In *Daniell's Ch. Prac.*, 5th ed., p. 1435, it is stated that orders of course are those to which no opposition can be offered, and are drawn up without any direct application to the Judge, and special orders are those which the Court, in the exercise of its discretion, may either grant or refuse.

In the present case I think it cannot be fairly said that the *præcipe* order obtained was one to which no opposition could have been offered, and I think it was improperly applied for. The deputy registrar who granted the order was not supposed to know the facts and circumstances, and the whole responsibility rested with the applicant for the order.

I am of the opinion that the appeal should be allowed, and the order obtained upon *præcipe* vacated or set aside. I think an order of reference to taxation in this case should be obtained, if at all, upon a special motion made for the purpose.

As to the cross-motion, the parties to it and the appeal have chosen to leave, as I think, an important fact in doubt. The payment mentioned by the solicitor in his affidavit is not inconsistent, I think, with the fact being that he simply deducted the amount of his claim for costs out of the purchase money that came into his hands, the mortgagees' manager not being dissatisfied with this. There is not positive evidence that such was the fact. There is evidence of belief, and what I think was the ground of the belief or source of information given, that such was the fact, and what is sworn as to what was said by the manager of the mortgagees' company tends to lead me to the belief that he, at all events, was not very particular as to how much or how little the solicitor got for his services. His language would seem to indicate that he had forgotten that he was, or his company were, trustees for the mortgagor, or those entitled through or under him in respect of any balance or surplus of the purchase money there might be.

Under such circumstances I think it better not to make the order asked by the cross-motion, the refusal of it being without prejudice to any special motion for an order of reference of the bill to taxation, or any other remedy the mortgagor may have in the premises.

The appellant is, I think, entitled to his costs of the appeal, and his costs in Chambers.

As I think each party more or less at fault respecting the evidence adduced in support of and in opposition to the cross-motion, there will be no costs in respect of it.

Order accordingly.

REID V. MURPHY.

Interpleader—Sale of goods—Sheriff's charges.

By an order made upon an interpleader application, a sheriff was directed to sell the goods in question and pay the proceeds into Court, less his possession money and expenses of seizure and sale. The sheriff did so; the interpleader issue was tried, and resulted in favour of the claimant. An order was then made in Chambers directing that the sheriff should pay into Court the amount retained by him under the previous order, and that the execution creditor should pay the sheriff his proper charges for possession money, &c.
Held, that this was the proper order to make.

[October 3, 1887.—*Proudfoot, J.*]

UNDER the plaintiff's execution against the defendant in this action the sheriff of Wentworth seized certain goods supposed to be the property of the defendant, which were claimed by one Furlong as trustee for the defendant's wife. Upon the application of the sheriff for an interpleader order an issue was directed to be tried, and the claimant not giving security for the goods, the order further directed that the sheriff should sell them and pay the proceeds into Court to abide the event of the interpleader issue, less the sheriff's possession money and expenses of seizure and sale. The order also provided that all costs and all further questions should be reserved till after the determination of the issue. This order was made on the 27th of May, 1885. The sheriff sold and paid the money into Court, deducting his charges as directed. The issue was tried, and resulted in favour of the claimant, who was thus adjudged to have been the true owner of the goods at the time of seizure. The claimant then moved in Chambers for a final order, and Mr. Winchester, an official referee, sitting for the Master in Chambers, made an order barring the execution creditor, with costs, directing the sheriff to pay into Court the amount retained by him for his charges, and for payment out of the whole amount to the claimant. The order also directed that the execution creditor should pay to the sheriff the amount which should be taxed to him

for possession money, &c. The sheriff appealed to a Judge in Chambers from that part of the order which directed the sheriff to pay into Court the amount retained by him.

Bicknell, for the appeal. Even if the practice laid down in *Ontario Bank v. Revell*, 11 P. R. 249, is the proper practice, which I do not admit, the first order made here allowed the sheriff to retain out of the proceeds of the sale his charges for possession money, &c., and he should not afterwards be ordered to refund. The sheriff may recover the amount from the execution creditor, but he should not be put in the position of having to pay it out of his own pocket, and then look to a possibly insolvent execution creditor. It is a great hardship upon the sheriff, who was not here the agent of the execution creditor, but the officer of the Court, for he sold under the order of the Court: *Reid v. Gowans*, 13 A. R. 501. The proper practice is laid down in *Bland v. Delano*, 6 Dowl. P. C. 293.

Hoyles, for the claimant, contra. If some one has to suffer in this case, it should not be the claimant. The goods were his; it has been so resolved by the Court; they were unjustly seized under an execution against another man, and sold. Surely he suffers enough by having to submit to a forced sale of his goods, when a sale in another way, at his own time, would have doubtless brought a much larger price, without having to suffer the additional burden of a deduction from the price of the goods of the charges of the sheriff in respect of his wrongful seizure and sale. The practice now followed, as shewn by *Ontario Bank v. Revell*, is to make the sheriff pay into Court the gross proceeds of the sale to abide the issue; that was not done here, but the order subsequently made upon the sheriff to refund is in accordance with a practice well settled in Chambers. Unfortunately there is no reported case, but I refer to two unreported ones: *Lucas v. Bulley*, decided by Mr. Justice Armour in 1878, and *Bigham v. Gamble*, decided by Mr. Dalton, Master in Chambers, in January, 1885. In these cases, as the papers shew, the

orders made were substantially the same as in this case. I also refer to *Dabbs v. Humphries*, 3 Dowl. P. C. 377 ; and to *Cababé* on Interpleader at pp. 87, 89. In this case, at all events, the sheriff suffers nothing, as the execution creditor is perfectly solvent.

PROUDFOOT, J., dismissed the appeal, with costs, holding that the order of Mr. Winchester was the proper one to make.

SNOWDEN V. HUNTINGTON ET AL.

Costs—Taxation—Local taxing officer—Rule 447.

Rule 447 applies to a taxation of costs conducted by a local taxing officer under the powers given him by 48 Vic. ch. 13, sec. 22 (O.), and an appeal from such taxation does not lie unless objections are carried in before the officer, as required by that rule.

Quay v. Quay, 11 P. R. 258, followed.

[October 4, 1887.—*Proudfoot, J.*]

AN appeal by the defendant Morris from the taxation of his costs by the local registrar at Cornwall came on for argument on the 3rd October, 1887.

Hoyles, for the plaintiff, objected that the appeal would not lie, because no written objections had been delivered or carried in before the local registrar, as required by Rule 447, O. J. Act: citing *Quay v. Quay*, 11 P. R. 258.

W. M. Douglas, for the appellant, contended that Rule 447 did not apply to the taxation of costs by a local officer, but only by "the taxing officer," which means one of the taxing officers at Toronto; citing *Grant v. Grant*, 10 P. R. 27; *Crowe v. Steeper*, 2 C. L. T. 88.

Hoyles, in reply. A different meaning has been given to this Rule since *Grant v. Grant*, owing to the Act 48 Vic. ch. 13, sec. 22 (O.). and *Quay v. Quay* is a plain decision on the point since that Act.

The appeal was then argued on the merits subject to the objection.

PROUDFOOT, J., after reserving judgment, said that he was reluctantly compelled to give effect to the objection. He must hold, following *Quay v. Quay*, that rule 447 applied to taxations by local officers, and the appeal was therefore irregular and should be dismissed, with costs. On the merits he was with the appellant, believing that he was entitled to the additional costs which he claimed.

FOGG v. FOGG.

Venue—Alimony action—Preponderance of convenience.

The venue was changed from Whitby to Toronto in an action of alimony upon the application of the defendant, where there was not sufficient difference in expense to warrant the change in an ordinary case, because of the rule in alimony cases which imposes on the defendant the burden of advancing and paying all the disbursements on both sides in any event.

The circumstance that two of the defendant's witnesses, who resided in Toronto, were public officers, and that their absence would be a public inconvenience, was also considered in determining the preponderance of convenience.

[October 17, 1887—*Ferguson, J.*]

AN appeal by the defendant from an order of Mr. Winchester, an official referee, sitting for the Master in Chambers, refusing to change the place of trial from Whitby to Toronto.

The action was for alimony, the plaintiff alleging cruelty on the part of her husband, the defendant.

During the whole time of their cohabitation, twelve years, the parties lived in Toronto, and at the time of the application they were also both living in Toronto, but in the meantime the plaintiff had lived in Oshawa with her parents.

The defendant swore that he would require at the trial ten witnesses, including himself, all of whom resided at Toronto, except one at South River, who would have to go through Toronto to reach Whitby. Two of the defendant's ten witnesses were medical officers of the Provincial Lunatic Asylum, Toronto, where the plaintiff had twice been confined.

The plaintiff swore that she would require the evidence of herself and of her father and mother, who lived in Oshawa, and of four other witnesses in Oshawa, who were to be called to prove that the plaintiff was of a kindly disposition, and an economical house-keeper.

It was also shewn on behalf of the defendant that the plaintiff's parents were frequently in Toronto, spending a large part of their time there.

Oshawa is four miles from Whitby, and Toronto thirty miles from Whitby.

H. Cassels, for the appeal, admitted that in the face of such decisions as *Walton v. Wideman*, 10 P. R. 228; *Slater v. Purvis*, *ib.* 604, he could not hope to succeed in changing the venue if this were an ordinary case; but he contended that as, according to the well known rule in alimony suits, the defendant would have to bear all the disbursements of both sides, whatever might be the event of the action, such a difference in expense as existed in favor of Toronto was quite sufficient. The balance of convenience, apart from the question of expense, was certainly in favor of Toronto. The two medical officers of the asylum would find it very inconvenient to leave their public duties to go to Whitby, while if the case were tried at Toronto they could be summoned by telephone at the moment when their evidence should be wanted.

Chapple, *contra*, relied on the cases cited *supra*, and also urged that there was great inconvenience in a trial at Toronto on account of the long docket; witnesses were often kept in attendance for several days.

FERGUSON, J.—The charges against the defendant are charges of cruelty. The parties, while they cohabited, lived in the city of Toronto. Their whole married life from 1874 till last year was spent in Toronto. This would naturally be the place to obtain evidence other than the evidence of the parties themselves respecting such charges. The difference in the expenses in the ordinary case of change of place of trial is chiefly the difference in the amount of the disbursements. This is what is commonly called the balance of convenience, though the balance of convenience may embrace other matters. In the present case the defendant has to advance and pay all the disbursements on both sides of the action, no matter what may be the result of the trial. Then there are two public officers to be called as witnesses for the defendant. They reside in Toronto. Their absence would be a public inconvenience. In view of all these matters, and especially the fact that the defendant has to pay all the disbursements as aforesaid, I think the place of trial should be changed from Whitby to Toronto, even though it may not appear that there is so great a preponderance of convenience as seems, according to some of the cases, to be required to change the place of trial.

Appeal allowed, without costs.

RE GABOURIE—CASEY V. GABOURIE.

Leave to appeal—Extension of time—Excuse for delay—Requirement of justice.

Two of the defendants (legatees) in an administration suit appealed from the report of a Master and thereby succeeded in charging the plaintiff, an executor, with their shares of a sum of \$4,000, which the executor had lost to the estate. The other defendants did not appeal, and as to them the report became absolute on the 24th March, 1887. Three of these defendants in September, 1887, after the success of their co-defendants' appeal was established, moved for leave to appeal and to extend the time, their excuse for the delay being that they had supposed the appeal of their co-defendants would enure to their benefit.

Held, that justice required that the time for appeal should be extended, and these defendants let in to appeal, upon their placing the executor in as good a position as he would have occupied if they had appealed within the time allowed; notwithstanding that the \$4,000 was lost to the estate by an innocent mistake of the executor, that he had acted as he did by reason of the instructions given him by the testator, and his acting and taking advice according to the instructions had led directly to the mistake.

Langdon v. Robertson, 12 P. R. 139, followed.

Birls v. Betty, 6 Madd. 90, distinguished.

[October 19, 1887.—*Ferguson, J.*]

AN appeal by the plaintiff (executor) from an order of the Master in Chambers giving leave to the defendants Joseph Gabourie, Edward Gabourie, and Mary Rochette, to appeal from a report of the Master at Belleville, after the report had become absolute, and extending the time for such appeal.

The report was made on the 22nd of February, 1887, and became absolute on the 24th of March, 1887.

The application for leave to appeal was made on the 30th of September, 1887, and the order appealed from on the 7th of October, 1887.

The reason that Joseph Gabourie and the others did not appeal from the report in time was, that their solicitor held the mistaken opinion that his clients would have the benefit of the appeal of certain other defendants from the same report. (See 13 O. R. 635.)

The appeal was argued on the 10th of October, 1887.

J. Maclellnan, Q. C., for the appeal. The applicants want to be relieved from the consequences of their solicitor's mistake in order to take advantage of a mistake of the executor. They deliberately took the risk of the other appeal enuring to their benefit, and they should not now be relieved: *Langtry v. Dumoulin*, 4 C. L. T. 348; *Shupe v. Shupe*, *ib.* 129; *Coates v. McGlashan*, 2 Ch. Chamb. R. 218. The executor was held liable *strictissimi juris*, and so should the applicants: *Dunnard v. McLeod*, 8 P. R. 343. The executor has acquired a vested right which should not be disturbed: *International v. Moscow*, 7 Ch. D. 241; *Craig v. Phillips*, *ib.* 249; *McAndrew v. Barker*, *ib.* 701; *Re Mansel*, *ib.* 711; *Curtis v. Sheffield*, 21 Ch. D. at p. 5; *Re Manchester, &c., Society*, 24 Ch. Div. 488; *Miller v. Brown*, 9 P. R. 542; *Wilby v. Standard Fire Ins. Co.*, 10 P. R. 34.

Hoyles, *contra*. Rule 462, O. J. A., gives power to enlarge the time for appealing. The true rule as to granting leave to appeal is shewn in *Sievwright v. Leys*, 9 P. R. 200; *Lewis v. Talbot St. Co.*, 10 P. R. 15; *Langdon v. Robertson*, 12 P. R. 139. The discretion which the Court has to grant leave to appeal should be exercised so as to work out justice in each particular case, and not according to any cast iron rule: *Collins v. Paddington*, 5 Q. B. D. 372; *Carter v. Stubbs*, 6 Q. B. D. 116; *Re New Callao*, 22 Ch. D. 484.

Maclellnan, in reply, referred to *Gilbert v. Jarvis*, 2 Ch. Chamb. R. 259; *Birls v. Betty*, 6 Madd. 90; *Re Crosby*, 56 L. T. N. S. 103.

FERGUSON, J.—This is an appeal from a decision of the learned Master in Chambers allowing an appeal, or rather extending the time for an appeal, by certain of the parties concerned who did not appeal in proper time, and it has occasioned me much anxiety. The parties now desiring to avail themselves of an appeal, such as the one in which other parties in the same interest were successful against the executor, intended from the beginning to appeal as those others did, but by reason of an erroneous view

taken, namely, that the appeal of the others would enure to their benefit, and solely for this reason, they did not appeal. It rather appears that all parties to the litigation were of the same opinion, that is, that the appeal that had been lodged would enure to the benefit of all in the same interest as the appellants, until the question was raised by counsel on the argument of the case on re-hearing the judgment of the Chancellor.

The learned Master has decided that those parties should still be allowed to appeal (imposing proper terms, I apprehend), and from this decision the present appeal is.

The case before me was argued with much skill and learning on both sides, and many, I think all, or nearly all, the authorities on the subject referred to. These I have since perused, and I have found and perused one or two others, and after so doing I am prepared to agree with the remark made in the judgment in *Sievwright v. Leys*, 9 P. R. at 201, that "where discretion as distinguished from strict law is given, as to a course to be followed, it is obviously hopeless to look for uniformity."

In the case *Langdon v. Robertson*, 12 P. R. 139, it appears that the Court of Appeal was of the opinion that the rule laid down in *Sievwright v. Leys* is the proper rule to be acted upon in regard to the extension of time to appeal. That rule seems to be that *to do justice in the particular case, where there is discretion, is above all other considerations.*

What appears to me to be in effect the same as the above is stated by Brett, M. R., in the case *Re Manchester, &c., Society*, 24 Ch. Div., at p. 497, where that learned Judge said, "I know of no rule other than this, that the Court has power to give the special leave, and exercising its judicial discretion is bound to give the special leave, if justice requires that that leave should be given."

I do not profess or intend here to give any synopsis of the cases that I have examined. I do not think to do so would tend to any good. I think I am bound by and should follow the view stated by the Court of Appeal

above referred to, my great difficulty being to determine what "justice" does require in the present case with regard to the matter in contention.

I was much impressed with the argument of counsel in favour of the executor, resting as it did on the ground that though he had been guilty of a breach of trust, he had been entirely innocent, and that it was plain (indeed not disputed), that he had acted as he did by reason of the instructions given him by the testator, and his acting and taking advice according to such instructions had led directly to the breach of trust complained of; that what he did was, upon the undisputed facts, a mere mistake and should be so considered; and that the effect of extending the time to appeal would be simply to relieve the legatees from the effect of their mistake to enable them to take advantage of the mistake of the executor, and compel him to pay moneys that he never received or had, and which were lost by reason of his having followed the instructions of the testator, under whom the legatees claim as volunteers. In this part of the argument counsel referred to and relied upon the case *Birls v. Betty*, 6 Madd. 90. In that case, however, there was an act done by the author of the trust, namely the actual division of the trust money, and this was the ground of the decision, the Court considering that the division of the money was a term in the creation of the trust.

This seems to me to make the case different from the present one in any position in which it was sought to place it, or in which, by possibility, it can be placed upon the facts as they appear; and the opinion at which I have arrived is, that the present case must be considered as one between, and only between, the legatees who desire to have the time extended for their appeal and the executor, who was trustee of their rights and interests in the estate, and in this view the question is, does justice require that the time for the appeal should be extended, and these legatees let in to appeal; and after the best consideration I have been able to give the subject, I am of the opinion that justice does require it. I can well understand, and I think

I do understand the hardship and misfortune that falls upon the executor (or that will befall him in the event of the proposed appeal being successful); but I do not think the consideration of this sufficient to outweigh what I think are the requirements of justice, the giving to these legatees what they had as of right without qualification, had they not made the mistake of permitting, for the reasons before stated, the time prescribed for the appeal to pass without appealing, they being now willing to place the executor in as good a position as he would have occupied if they had appealed within the time allowed.

I am, for these reasons, of the opinion that the decision of the learned Master should be affirmed, but I think there should be no costs of this appeal.

Order of the Master affirmed, without costs.

[Carried to the Court of Appeal.]

MCKAY v. KEEFER.

Partition—Reference—Fees to experts—G. O. Chy. 240.

In the course of a reference to make a partition of lands, a Master appointed two skilled persons to examine the property and prepare a scheme of partition, and on their evidence he adopted the scheme prepared.

Held, that the course adopted by the Master was a reasonable one; that he had the power under G. O. Chy. 240 to take such course, and that the fees paid to the skilled persons by the defendant should be taxed to him.

[October 19, 1887.—*Ferguson, J.*]

AN appeal by the defendant Thomas C. Keefer from the ruling of Mr. Thom, one of the taxing officers at Toronto, upon revision of the costs of a partition matter, in which infants were interested, disallowing to the appellant two sums of \$110 and \$115 paid by him to two persons appointed by the Master at Ottawa, in the course

of a reference, for preparing a scheme for partition of the lands in question. The scheme was reported and the partition effected according to it.

The facts appear in the judgment.

The appeal was argued on the 17th October, 1887.

W. H. Blake, for the appeal.

Middleton, contra.

The following authorities were referred to: General Orders Chy. 240, 482, 541; *Re Robertson*, 24 Gr. 555; *Re London and Birmingham R. W. Co.*, 6 W. R. 141; 1 *Holmested*, R. & O. p. 328.

FERGUSON, J.—The matter of partition had before been referred to the Master. He had reported in favor of a sale of the property—at least, such is my recollection. That report or certificate was objected to by some of the parties concerned, and owing to the peculiarity and importance of the case some directions were given and proceedings had that were in character not usual; and it was eventually referred back to the Master to take further evidence and to re-consider the question as to whether a partition could be made of the lands or of any part thereof, as directed, &c. The Master thereupon directed each of the parties to the contention to name a person possessing knowledge or skill respecting such subjects to examine the property and propose or shew, if reasonably possible, a mode or scheme of partition, &c., and appear before him as witnesses. One of the parties to the contention declined to do this, or to do anything by way of aiding the Master in obtaining the necessary information. This being the state of things, the Master appointed two indifferent persons, being, as it is said and not denied, skilled or possessing special knowledge on such subjects, who examined the property and proposed a plan of partition. He then caused one of these, and I do not know but the other as well, to be examined before him as a witness, and on the evidence he adopted or concluded a plan, scheme, or mode of partition, and, as

I understand, is now prepared to say that there can be a partition, and to shew the character of such partition.

He did not refer the matter to those persons and take the scheme devised by them, but adopted this mode of obtaining, under the peculiar circumstances, further evidence and more information, the better to enable him to exercise his own judgment in respect to the matter referred to him.

The amounts paid these two persons for their trouble and time in examining the property and doing what was required of them were disallowed by the taxing officer, and from this is an appeal.

The items are not objected to on account of their amounts, it being not disputed that, if any sums are to be allowed, the amounts are not unreasonable.

The justice of the matter is, I think, manifestly in favor of allowing these items. The contention was, that the Master had no power to adopt the course that he took in this respect. I cannot but think that the course taken by the Master was, when all the circumstances of this case are fairly looked at, a reasonable and sensible course, and that these items should be allowed if it is possible to sustain their allowance as a matter of law. General Order 240 does authorize the Master, in some cases at all events, to substitute a different course of proceedings from that ordinarily taken, and I am not prepared to say that what the Master did in this instance is not within the meaning of this provision in the Order.

On the whole case and looking at the apparently peremptory character of the reference back to the Master, I am of the opinion that the items in question should have been allowed by the taxing officer, and I think the appeal must be allowed. I suppose the costs will follow.

Order accordingly.

REGINA V. MCGAULEY.

"*The Indian Act*," R. S. C. ch. 43, sec. 108—*Summary Convictions Act*, R. S. C. ch. 178—*Conviction*—"Appeal brought"—*Time*.

The words "appeal brought" in sec. 108 of the Indian Act, R. S. C. ch. 43, are satisfied by the giving of notice and perfecting the appeal by the giving of the security provided for by the Summary Convictions Act; and it is not necessary for an appellant from a conviction under that Act to bring his appeal to a hearing within the time limited by sec. 108.

In re Hunter v. Griffiths, 7 P. R. 86, not followed.

Semble, merely giving notice of appeal within the thirty days would have satisfied the words of the statute.

[November 3, 1887.—*Armour*, J.]

THE defendant was on the 29th day of March, A.D. 1887, at Mississauga, in the district of Algoma, convicted before James C. Phipps, one of Her Majesty's Justices of the Peace for the district of Algoma, and Indian Agent, on the complaint of Peter Boyer of Mississauga, farmer, for that he, the defendant, on the 1st day of January, 1887, at Mississauga, did supply intoxicating liquor to an Indian named Richard Boyer, or cause or procure the same to be done by his hired man, Joseph Demorest, and was adjudged for his said offence to forfeit and pay the sum of one hundred dollars, to be paid and applied according to law, and also to pay the said Peter Boyer the sum of \$4.70 for his costs in that behalf.

The defendant was also, on the 29th day of March, 1887, at Mississauga, in the district of Algoma, convicted before James C. Phipps, one of Her Majesty's Justices of the Peace for the district of Algoma, and Indian Agent, on the complaint of George E. Green, of Manitowaning, constable, for that he, the defendant, on the 1st day of January, 1887, at Mississauga, did supply intoxicating liquor to an Indian named Joseph Menherosegaïd, or cause or procure the same to be done, contrary to the provisions of the Indian Act, 1880, and amendments thereof, and was adjudged for his said offence to forfeit and pay the sum of one hundred dollars, to be paid and applied according to law, and also to pay the said George E. Green the sum of \$9.60 for his

costs in that behalf, and it was ordered that if the several sums should not be paid forthwith, the same should be levied by distress and sale of the goods and chattels of the defendant.

The defendant was also, on the 29th day of March 1887, at Mississauga, in the district of Algoma, convicted before James C. Phipps, one of Her Majesty's Justices of the Peace for the district of Algoma, on the complaint of George E. Green, of Manitowaning, constable, for that he, the defendant, on the 9th day of February, 1887, at Mississauga, did supply intoxicating liquor to an Indian named Joseph Bonekersh, or cause or procure the same to be done by his hired man, Joseph Demorest, contrary to the provisions of the Indian Act, 1880, and amendments thereto, and was adjudged for his said offence to forfeit and pay the sum of one hundred dollars, to be paid and applied according to law, and also to pay the said George E. Green the sum of \$9.60 for his costs in that behalf, and it was ordered that if the several sums should not be paid forthwith, the same should be levied by distress and sale of the goods and chattels of the defendant, and also to be imprisoned in the common gaol of the said District of Algoma, at Sault Ste. Marie, in the said district of Algoma, for the space of three months.

The defendant was not in custody, and he thereupon paid to the said convicting justice the sum of \$600 to cover the sums so adjudged to be paid, together with the costs of the convictions and the costs of the appeal, for which the said convicting justice gave him the following receipt:

"Received of Mr. James McGauley the sum of six hundred dollars, being a deposit to be transmitted to the clerk of the peace of the district of Algoma, the said deposit being intended to cover fine, costs of conviction, and costs of appeal in three cases of supplying intoxicating liquor to Indians, or causing or procuring the same to be done, for which the said James McGauley has been convicted this day.

"Mississauga,

"29th March, 1887.

"JAMES C. PHIPPS,

"*J. P. and Indian Agent.*"

The defendant also gave notices of his intention to enter and prosecute an appeal to the presiding Judge who might be appointed to hold the next sittings of the High Court of Justice for Ontario, to be holden at the village of Sault Ste. Marie, in and for the district of Algoma, and that the said appeal should be heard and adjudicated upon by the said Judge at the said sittings, against the said several convictions, upon the grounds in the said notices set forth, which several notices were duly served upon the convicting Justice on the 11th day of April, 1887, and the notices of appeal against the convictions in which George Green was prosecutor, were duly served upon the said George Green on the said 11th day of April, 1887, and the notice of appeal against the conviction in which Peter Boyer was prosecutor, was duly served upon the said Peter Boyer on the 16th day of April, 1887. The defendant also duly entered into three several recognizances to try the said appeals, one for each conviction. These appeals were duly set down to be heard before Armour, J., the justice assigned to take the sittings of the High Court of Justice for the district of Algoma, held at the village of Sault Ste. Marie on the 7th day of July, 1887, and thereat *Kehoe* appeared for the prosecutor, and *Laidlaw*, Q. C., for the defendant, and the said appeals coming on to be heard, the objection was taken by *Kehoe* that thirty days from the convictions had then expired, and that consequently the appeals could not be heard, and he referred to the R. S. C. ch. 43, sec. 108, and cited the decision of Hagarty, C. J. C. P., *In re Hunter v. Griffiths*, 7 P. R. 86, in support of his objection, and said that he did not otherwise intend to support the convictions than by insisting upon this objection.

ARMOUR, J.—The decision of the learned Chief Justice, cited by Mr. Kehoe, is directly in point, and if I follow it, the appeals must be dismissed. I am not bound to follow it, because there is no appeal from my decision, and I am therefore bound to give my independent judgment upon the matter, and doing so, I am compelled to say, with the

greatest respect for the learned Chief Justice, that the decision *In re Hunter v. Griffiths* is, in my opinion, erroneous.

The sections of the Summary Convictions Act, R. S. C. ch. 178, relating to appeals, apply to these convictions, which were made under the Indian Act, R. S. C. ch. 43, except as otherwise provided by section 108 of the Indian Act, which provides that no appeal shall lie from convictions such as these "except to a Judge of a Superior Court," (which, by R. S. C. ch. 1, sec. 32, means in the Province of Ontario, the Court of Appeal for Ontario, and the High Court of Justice for Ontario), "County, Circuit, or District Court, or to the Chairman or Judge of the Court of the Sessions of the Peace having jurisdiction where the conviction was had; and such appeal shall be heard, tried, and adjudicated upon by such Judge or Chairman without the intervention of a jury; and no such appeal shall be brought after the expiration of thirty days from the conviction." And the question is, what is the proper construction to be put upon the words, "appeal shall be brought"?

Having regard to the analogy of statutes which limit the period within which actions shall be brought, "appeal brought," would mean "appeal commenced," for under those statutes an action is held to be "brought" when it is commenced.

The meaning of appealing is giving notice to your adversary of your intention to appeal by serving him with a notice of appeal: *Ex parte Saffery*, 5 Ch. D. 365.

Reading the sections of the Summary Convictions Act relating to appeals with section 108 of the Indian Act, I should say that what was meant by "appeal brought" in section 108 of the Indian Act was that notice of appeal should be given.

The words "appeal brought," are certainly, however, satisfied by the notice of appeal having been given, and the appeal having been perfected by the giving of the security provided for by the Summary Convictions Act.

The appellant in this case did every thing, in my opinion, that the law required him to do; he gave notice of appeal,

and he gave proper security for the prosecution of his appeal, and he did all this within thirty days from the conviction, and, I think, therefore, that his appeal was brought within thirty days from the conviction.

It is contended that he ought to have done more than this, that he ought to have brought his appeal to a hearing within thirty days from the conviction, and that "appeal brought" means "appeal brought to a hearing." To this I cannot agree: to so read the words "appeal brought," would be putting a construction upon them which, when fairly read, they do not bear.

The Supreme and Exchequer Courts Act, R. S. C. ch. 135, sec. 40, provides that "Except as otherwise provided, every appeal shall be brought within thirty days from the signing, or entry, or pronouncing of the judgment appealed from," and it has never been determined, so far as I have been able to discover, that the words, "appeal brought," in this section mean "appeal brought to a hearing."

In my opinion the convictions must be quashed, without costs.

Convictions quashed, without costs.

WARNOCK V. PRIEUR ET AL.

Foreclosure—Opening—Irregularities—Lunatic defendant—Appointment of guardian ad litem—Chambers judgment—Rule 69, O. J. A.—G. O. Chy. 434, 645.

In a mortgage action for foreclosure a local Master appointed the Official Guardian to represent a lunatic defendant as guardian *ad litem* without notice being served, as directed by Rule 69, O. J. A. The guardian made full inquiries, communicated with the relatives of the lunatic, and put in the usual formal defence on behalf of the lunatic; and a judgment of foreclosure was obtained in Chambers against all the defendants, including infants and the lunatic defendant.

Held, that the order appointing the guardian was an erroneous one, for which there was no proper foundation, not a mere irregularity which could be waived by the subsequent steps taken to protect the lunatic's rights.

Held, also, that the term, "adult," in G. O. Chy. 645, does not include a lunatic or person of unsound mind; and therefore that a judgment against a lunatic could not be obtained in Chambers under G. O. Chy. 434.

[June 8, 1887—*The Master in Chambers.*]
[September 28, 1887—*Boyd, C.*]

AN application by the defendants to open a foreclosure. The facts appear in the judgment.

E. Taylour English and *A. J. Williams*, for the defendants.

J. Maclellan, Q. C., for the plaintiff.

THE MASTER IN CHAMBERS.—This is an application to open a foreclosure. The plaintiff was mortgagee of the land in question, and judgment of foreclosure was pronounced on 28th February, 1884, and the final order was made the 2nd September, 1884. Since September, 1884, the plaintiff has been in possession.

Prieur and Taillon, 10th March, 1876, mortgaged to the plaintiff for \$2,000 with interest at ten per cent. per annum, the land being in the township of Nepean, in the neighborhood of Ottawa, containing about seventy-five acres. Bellemaire, a defendant, who with the representatives of the mortgagors is now a party to this motion, was interested as a purchaser of a part of the land from Prieur and

Taillon—at the time when the mortgage was given—but his position in that respect was, at the taking of the mortgage, unknown to the mortgagee; no conveyance, contract, or other evidence of the interest of Bellemaire being registered. Taillon, one of the mortgagors, became of unsound mind before the commencement of this suit.

In September, 1884, shortly after the final order, the plaintiff entered into possession, and made some improvements on the land. It has now been expropriated by the Dominion Government for the purposes of an experimental farm, and the price paid by the Government for the land, fixed by arbitrators, \$7,000, has been paid into Court by the Government.

The mortgagors and Bellemaire, or rather the representatives of the mortgagors, for both the mortgagors are now dead, allege that the equity was foreclosed for a sum much below the value of the land; and they further allege certain irregularities in the proceedings, which they think entitle them to open the judgment.

1. That the writ of summons in the action was not duly served according to the requirements of the Judicature Act, in case of the defendant Taillon, who had become lunatic.

2. That the guardian *ad litem* was irregularly appointed, the order having issued on the non-appearance by defendant Taillon—on the application of the plaintiff upon *præcipe* merely—being an entirely *ex parte* proceeding, without any notice at all to the lunatic defendant. This also is alleged as a fatal irregularity.

3. Then the judgment of foreclosure was given in Chambers, and not in Court, and this is urged as fatal, for that in case of a lunatic defendant, such a judgment could be given not otherwise than in and by the Court.

Bellemaire, who moves, did not defend the suit at all. He consulted a lawyer when served with the writ of summons, but was advised that he had no case to defend on, and to let judgment go. He did so. He alleges that in 1874 he had a contract of purchase of part of the land with

the mortgagors, and that he then entered on that portion, and made improvements, and that he was in possession at the time of the mortgage. And he alleges that from time to time before this suit he had paid the mortgagors, in the manner he describes, as much as three quarters of the purchase money. I think it is a fact that at the time of the mortgage the mortgagee had no knowledge of Bellemaire's position—as I have said, nothing on his part was registered. It is easy to imagine why Bellemaire was advised not to defend. Since the foreclosure, however, a deed from the mortgagors to Bellemaire, the date of which is not shown—it must have been after the mortgage—has been found, never delivered—and its existence not known to Bellemaire—but in the possession of a solicitor in Ottawa, who held it for Taillon, the mortgagor, and apparently still holds it for those claiming through Taillon, who died in 1885, since the making of the final order.

Then as to the defects and irregularities in the proceedings which are alleged, the Rules under the Judicature Act which are important are 38, 39, 69, and 124.

Rule 38 gives the manner in which service of the writ of summons may be made in the case of a defendant of unsound mind. It is alleged that no service at all was made. I need not say anything more of this Rule, as it is satisfactorily proved that the service of the writ of summons was regularly made, according to the terms of the Rule.

Rule 39 is to the effect that no further proceedings (that is, after the service of the writ of summons) are to be taken against a lunatic defendant who has no committee, until a guardian *ad litem* is appointed. The lunatic defendant here had no committee.

Then Rule 69 directs the way in which a plaintiff may proceed where no appearance has been entered for the defendant. He may apply to the Court or a Judge for an order that the official guardian or some other proper person be assigned guardian of such defendant, by whom the lunatic may appear and defend the action. But it expressly

provides that no such order shall be made unless it appears on the hearing of such application that the writ of summons was duly served, and that notice of the application was, after the expiration of the time allowed for appearance, and at least six clear days before the day in the notice named for hearing the application, served upon, or left at the dwelling-house of, the person with whom or under whose care such defendant was *at the time of serving such writ of summons*. Whether these last words are a misprint I do not know. It would seem that "notice" is meant—not "writ of summons."

However, the objection made to the appointment of the guardian *ad litem* is that no notice whatever was given by the plaintiff of the application, but that a *præcipe* order was issued, as I have before stated, appointing the learned Official Guardian, guardian for the lunatic defendant *ad litem*.

The next rule is Rule 124, which enacts that lunatics, in the position of the defendant Taillon, who might before the Judicature Act have sued as plaintiffs, or would have been liable to be sued as defendants, may sue as plaintiffs in any action by their committees or next friends in the manner practised in the Court of Chancery before the passing of the Judicature Act, and may, in like manner, defend any action by their committees or guardians appointed for that purpose.

The judgment of foreclosure was here granted in Chambers, not in Court, from inadvertence doubtless. By the rule the practice then after the appointment of the guardian is to be regulated by the practice of the Court of Chancery before the Judicature Act. I cannot from books find that there is any authority for such a proceeding as giving the judgment in Chambers. In the case of infants the law had been changed before the Judicature Act to allow such a proceeding, but as to lunatics it is in this respect, by Rule 124 expressly left where it was before the Act. There are infants in this case, so called in the style of the cause, and though in the statement of claim the defendant

Taillon is stated to be a person of unsound mind not so found by inquisition, yet he is not so styled in the style of the cause. This may possibly have led to the mistake. But however it may have been, the fact is, that the judgment was given in Chambers.

As to the appointment of guardian, it is difficult to see how the mere lapse of time can run against a lunatic. Can neglect or carelessness be attributed to him? He is not of capacity to be charged with such defects—any more than he could be guilty of a crime. The only notice that was served of these proceedings, was the copy of the writ of summons.

And yet, it is undoubtedly the case that everything was done in the discharge of the duty of the learned Official Guardian that usually is done. I have seen the correspondence, and information was, I know, sought and obtained as to all the circumstances that affected the case, and the value of the property. The best opinions were obtained from the relations of the defendant and skilled people in Ottawa and from the other co-mortgagor as to the value, and the consequent policy of having a sale, or of allowing the land to be foreclosed; and no one who sees the papers now will doubt that a sound conclusion was come to, to let the foreclosure proceed. It is perfectly plain that the land was not then worth the \$2,865 that was then due on the mortgage. So that proceedings actually went on just as they ought to have gone on had no irregularity taken place, always excepting the irregularity. This leads me to notice one contention that has been made with which I cannot agree, that the much larger price now obtained for the land than the debt for which it was foreclosed, is in itself a sufficient reason for opening the foreclosure. I dare say there is an increased value in the land, but it is from causes which are operating no doubt as to land in the neighbourhood of many Canadian towns—notably near the city of Toronto. It is from increase of population, wealth, trade, and manufactures. But a man's property is his own, and what-

ever advantages may befall, the owner is entitled to the increased value arising from them. That there was not so great a value in the land as the debt it was forfeited for was very clear at the time of the final order, and no person of judgment would have advised a sale. The enhanced value has arisen since, from causes easily explained. It is true that there are philosophers who call such an improvement an *unearned increase*, as though to cast a doubt upon the owner's right to the enjoyment of it; but our law recognizes the owner's right to it; and so does the law of every other civilized country. The so-called increase is not a something which existed at the time of the foreclosure, only not discovered till now; it has accrued from causes operating since the foreclosure.

But I think that the irregularities are fatal, especially that the judgment taken is irregular.

This case must be regarded as still between first parties; no purchaser or encumbrancer has intervened.

It strikes me that the motion is not exactly in the proper form. Both motions are directed against the final order, which is well enough if the judgment be good. It is, it seems to me, the first erroneous proceeding that should have been attacked—that is the judgment. However, this has been argued upon the general question without reference to any such distinction, and I ought, it seems to me now to allow an amendment of the notice of motion to cover the matter really argued.

As to Bellemaire being a purchaser under the mortgagors—if he stood alone I do not see that he would have technically any case at all, and yet he is the only one who, in a broad sense, has suffered any hardship. As to his position, I refer to *Read v. Smith*, 14 Gr. 250; 16 Gr. 52; *Box v. Bridgman*, 6 P. R. 234; *Otter v. Lord Vaux*, 2 K. & J. 650; 6 D. M. & G. 638.

If the result is to be that the property produces a surplus beyond the mortgagee's claim, then out of that sur-

plus Bellemaire ought to be indemnified, before the mortgagors can be allowed to take it.

The plaintiff appealed from the foregoing decision to a Judge in Chambers, and the appeal was argued on the 26th September, 1887.

J. Maclellan, Q. C., for the appeal.

Foy, Q. C., and *E. Taylour English*, contra.

BOYD, C.—By Rule 38, when a lunatic or person of unsound mind is defendant, service on the committee or on the person with whom the person of unsound mind resides, or under whose care he or she is, shall, unless otherwise ordered, be deemed good service on such defendant.

By Rule 39, no further proceedings are to be taken against such defendant who has no committee, until a guardian *ad litem* is appointed.

By Rule 69, the plaintiff may apply for an order that the Official Guardian or other proper person be assigned guardian of such defendant, by whom he may appear and defend the action. But such order shall not be made unless it appears that the writ was duly served, and that notice of the application was served upon or left at the house of the person with whom or under whose care such defendant was at the time of serving the writ.

In this case the Master at Ottawa appointed the Official Guardian to represent the lunatic defendant as guardian *ad litem*, without notice being served as directed by Rule 69.

By Rule 124, lunatics may defend any action by their guardian appointed for that purpose in manner practised in the Court of Chancery before the passing of the Judicature Act. Defence was made by the Official Guardian; I suppose in the usual formal way, as no other defence was required upon the facts.

A judgment or decree of foreclosure was then obtained in Chambers against all the defendants, infants and him of

unsound mind, under the practice which it is said is sanctioned by General Orders 434 and 645, as recognized and adopted by Rule 3 of the Judicature Act.

General Order 434 provides that in an ordinary suit of foreclosure or sale against infants (representing the mortgagor) where no defence is set up in the answer, the cause is not to be set down in Court by way of motion for a decree; but is to be applied for in Chambers upon affidavits of the due execution of the mortgage, and such other facts and circumstances as entitle the plaintiff to a decree.

General Order 645 is in these words: "Order 434 shall apply to cases in which an adult is interested in the estate as well as an infant, and also to suits for redemption."

It was passed to overcome the difficulty pointed out in *Fullerton v. Keely*, 9 C. L. J. N. S. 54, which followed the unreported case decided by Strong, V. C., of *Lloyd v. Burke*. That difficulty arose where the combined action of the registrar granting a *præcipe* decree against adults, and of the referee in Chambers making a decree against infants, had to be invoked in order to procure a complete judgment. The term *adult* used in the order thus gets its interpretation as meaning one grown up to the age of man, as opposed to *infant*, meaning one who is under age. There was no intention to use the term so as to include lunatics or persons of unsound mind. These form a class who stand by themselves in the statute book, general orders, and in the rules of Court, and they are to be regarded as distinct from infants and adult parties. Order 645 was passed on 10th January, 1879, when a number of other orders were promulgated in which the term *adult* was used with the meaning of a person competent to act for himself: see Orders 638 and 640. Such is the meaning to be attributed to the term when used in General Order 645. That such is the proper construction is also manifest when the case of a sole defendant, being of unsound mind, is considered. There is no jurisdiction in such a case to award a judgment or decree in Chambers. By General Order 435 a judgment on *præcipe* might be obtained

against an adult defendant *sui juris* who had no defence to the mortgage action; but this provision does not extend to one who cannot admit or consent to judgment. Nor is there any order giving jurisdiction in case of a lunatic defendant to a Judge in Chambers. The motion for judgment in such a case would be under Rule 315: see *Kirkpatrick v. Howell*, 22 Gr. 94; G. O. Chy. 518; and *Byrne v. Byrne*, 5 L. R. Ir. 136, n.

I agree with the Master that there was no jurisdiction in Chambers to make the judgment of foreclosure in question, and though his attention was not called to the General Orders now relied on, I think they do not aid the appellant's contention.

Another point that is very formidable is, that the lunatic was not properly represented by the Official Guardian. The express provision of Rule 69 was disregarded, which requires that an order to appoint a guardian shall not be made without notice to those in charge of the lunatic. Though the order was made *ex parte*, the Official Guardian was justified in acting under it; no duty is cast upon him of investigating the proceedings leading up to his appointment: *Hamilton v. Hamilton*, 2 Ch. Chamb. R. 160. Yet notwithstanding all that happened, though the relatives were communicated with, and all precautions were taken to protect the lunatic's rights, yet I am not prepared to say that this will operate as a waiver of the irregularity so-called. This kind of order falls rather under the designation of an erroneous order, for the making of which there was no proper foundation, than an irregular one, to which latter the principle of waiver may be applicable: *Levi v. Ward*, 1 Sim. & Stu. 334.

The result is that the appeal is dismissed, with costs.

[Carried to the Court of Appeal.]

PLATT V. THE GRAND TRUNK R. W. CO.

Costs—Taxation—Appeal—Copies of opinions of Judges—Objections.

Upon an appeal to a Judge in Chambers from the taxation of costs by a local taxing officer, where the bill was referred to one of the taxing officers at Toronto as upon a revision;

Held, that there should be no costs of the appeal and revision unless substantially entire success was with one party or the other.

Charges for procuring copies of opinions of Judges in another action for the instruction of counsel should not be taxed as between party and party.

An appeal should not be allowed as to any item not included in the objections put in to the taxation.

[September 26, 1887.—*Boyd, C.*]

AN appeal by the defendants from a local officer's taxation of the plaintiff's costs of the action as against the defendants.

The defendants objected in whole or in part to items in the bill as taxed amounting in the aggregate to \$115. The whole bill was taxed at \$420. When the appeal came before a Judge in Chambers an interim order was made by consent, referring the bill to one of the taxing officers at Toronto, as upon a revision, to examine the items objected to and to certify his conclusion upon them to the Judge. The officer certified that in his judgment certain items objected to, amounting in the aggregate to \$34, should be taxed off.

The defendants then moved before the Judge in Chambers for an order as upon their appeal and the certificate of the taxing officer, and for the costs of the appeal and reference. They also asked to include in their appeal an item of \$10 allowed to the plaintiff, to which objection had not previously been made.

The plaintiff objected to one of the conclusions of the taxing officer, viz: that a sum of \$17.50, paid for copies of the opinions delivered by the Judges of the Supreme Court in a case of *Platt v. Attrill*, should not be taxed to the plaintiff. This expenditure was incurred because the decision in *Platt v. Attrill* affected, or was supposed to

affect, the merits of this case, and the judgments therein were not reported till after this action had been for some time ripe for trial. The copies of the opinions were used in making up briefs for the instruction of counsel, but not as evidence, or in any other way.

H. Cassels, for the defendants.

T. Langton, for the plaintiff.

BOYD, C.—I do not think I should admit any question as to an item not included in the objections put in to the original taxation. As to the copies of judgments, they were not evidence, nor was any attempt made to use them as such. They were, perhaps, necessary for the instruction of counsel; but in that view they could not be taxed as against the opposite party, but only between solicitor and client. Nor should there be any costs of appeal to either party. The success was divided: the appellant succeeded as to some of the items objected to, and failed upon others. On an appeal of this kind there should be costs only where there is substantially entire success with one party or the other.

PIERCE V. PALMER.

Statement of claim, delivery of—Irregularity—Waiver.

Upon the defendant's application to dismiss the action for want of prosecution, an order was made on the 6th May, that upon payment by the plaintiff of \$20 costs within 18 days, and upon his delivering his statement of claim within the same time, the defendant's application was dismissed. On the 26th May, after the expiry of the 18 days, the plaintiff filed his statement of claim, delivered a copy to the defendant's solicitors, and tendered them \$20, which they refused to accept. They also declined to admit service of the statement of claim, but retained it in their possession. On the 3rd June an order was made extending for one week the time for filing and delivering the statement of claim and paying the \$20. This order did not provide that the statement of claim already delivered should stand. Within the week the plaintiff paid the \$20, and nine days afterwards signed judgment against the defendant for default of defence, upon the statement of claim delivered on the 26th May.

Held, affirming the decision of the Master in Chambers, that although the plaintiff was wrong in filing and serving his statement of claim before paying the costs, this irregularity was waived and the service became effective when the costs were afterwards received, they being paid under the order of the 3rd June.

[September 14, 1887.—*The Master in Chambers.*]

[September 28, 1887.—*Boyd, C.*]

AN application by the defendant to set aside a judgment entered by the plaintiff upon default of delivery of a statement of defence. The motion was upon the ground that the delivery of the statement of claim was irregular. The facts appear in the judgment of the Master in Chambers.

C. J. Holman, for the motion.

Hoyles, contra.

THE MASTER IN CHAMBERS.—Upon looking at the wording of the orders made in Chambers in this case, I cannot see where any doubt can arise, under the facts, that the judgment signed by the plaintiff is regular.

On the 6th May last, on a motion by defendant to dismiss the plaintiff's suit for default in delivering his statement of claim, an order was made that upon payment of \$20 costs within eighteen days from said 6th May, and upon filing his statement of claim within the same time, defend-

ant's said motion should be dismissed. The plaintiff failed to comply with that order, his failure, as afterwards explained, having arisen from a delay which had occurred in the post office. On the 26th May, however, the plaintiff filed his statement of claim (two days too late, it seems to me), and delivered a copy to the defendant's solicitors, and tendered to them the \$20 costs. The costs the defendant's solicitors refused to accept, and declined to give any admission of service of the statement of claim. The statement of claim, however, was retained by the defendant's solicitors. No doubt they meant to signify that they did not accept service of the paper because made too late. The paper they nevertheless retained in their possession.

On the 3rd of June an order was made in Chambers "that the time for filing and delivering the statement of claim herein and paying the sum of \$20, as required by the order of the 6th May, be and the same is hereby extended until one week from the date of this order," (3rd June). Upon that, within the week so given, the plaintiff duly paid the costs, and nine days afterwards signed judgment against the defendant.

What is the effect of these two orders? The order of 3rd June had a relation backwards as well as forwards, and when it extended the plaintiff's time it made the time given to the plaintiff one continuous period from the 6th May to one week from the 3rd June. There was no break in it; it ran continuously from the making of the first order to the end of the time mentioned in the second order (I refer to *Lord v. Lee*, L. R. 3 Q. B. 404; *May v. Harcourt*, 13 Q. B. D. 688; and *Denton v. Strong*, L. R. 9 Q. B. 117), and so the order of 3rd June made the filing and service on the 26th May good, provisionally upon the costs being paid within the extended time. The costs were duly paid and received on the second occasion, and the effect of all was that the defendant was bound to put in his defence in eight days after payment of the costs.

I think the judgment regular. As to the affidavit of merits, it is insufficient. There would have been no difficulty

in obtaining an affidavit from the defendant. Under the circumstances of this case, before entertaining an application on the merits, it would certainly be stipulated that the defendant should bring the money into Court, for the defendant has removed all his property to Dakota. I do not desire to preclude him by my order now from such an application, if he desires to make one.

I dismiss this motion, with costs.

The defendant appealed, and the appeal was argued by the same counsel on the 26th September, 1887.

BOYD, C.—At first I was inclined to differ from the Master's reading of the two orders of the 6th May and 3rd June, but upon further reflection I think his conclusion is right. The plaintiff was wrong in filing and serving his statement of claim before paying the costs, but the copy served was retained by the defendant. This service was no doubt irregular, but the irregularity was waived and the service became effective, when the costs were afterwards received, they being paid under the order extending the time. It would seem a needless proceeding to file and serve another statement of claim, a fac simile of the former. But though in strict practice the defendant has no right to set aside the judgment, I think that the frame of the plaintiff's order of 3rd June was calculated to mislead him; for that spoke of the time for filing and delivering the pleading as extended for a week, implying that there had been theretofore no filing or delivery. For this reason I would let the defendant in to defend on paying into Court or securing to the plaintiff \$700 on account of his cause of action. If this is accepted in a month, there will be no costs of appeal, if not, I dismiss the appeal, with costs.

McMASTER ET AL. V. MASON.

Discovery—Examination of witness—Production of documents—Fraud—Rules 109, 285.

In an action of ejectment, where the plaintiff claimed title under a conveyance from the father of the defendant in 1885, and the defendant claimed by virtue of possession since 1874, under a verbal agreement to purchase made with his father, and the defendant said on his examination that he had paid his father money on account of the purchase, which he had entered in his father's books, an order was made for examination of the father and production of his books for the purpose of discovery before the trial.

Held, by the Master in Chambers, that the father might have been made a party under Rule 109, on the ground of his having been a party to a fraud in conveying land to the plaintiffs after he had made an agreement with his son, and such being the case, there was no doubt of his liability to be examined under Rule 285.

[October 7, 1887.—*The Master in Chambers.*]

[October 19, 1887.—*Galt, J.*]

THIS was an action of ejectment.

The plaintiffs claimed under a conveyance from the father of the defendant in 1885. They had also taken a mortgage from the father in 1876 to secure an indebtedness.

The defendant claimed title by possession, saying that he had gone into possession of the land in question in 1874 under a verbal agreement with his father to purchase, and had paid his father money, which he had entered in his father's books.

The plaintiffs moved under rule 285, O. J. A., for an order to examine the father and to obtain production of the father's books for discovery.

Walter Macdonald, for the plaintiffs, cited *Murray v. Warner*, 11 P. R. 440.

F. E. Hodgins, for the defendant, cited *Carnegie v. Federal Bank*, 10 P. R. 69; *Hooey v. Gilbert*, 12 P. R. 114; *Ind v. Emmerson*, 12 App. Cas. 300.

THE MASTER IN CHAMBERS.—If the son's examination shews the truth on his part, it argues a case of fraud against the plaintiffs on the part of the father and son.

Defendant says : In 1876 I went into business with my father in the dry goods trade. I continued with him until he failed. The style of the firm was Mason & Son. The defendant knew of the mortgage to plaintiffs, and said nothing. He says he was nominally "Son" in Mason & Son. Defendant did a good deal of the buying ; did it principally. Does not know whether the merchants understood he was a member. Did not know how it was registered, but believed it was registered in the name of Mason as proprietor, but to go under the style of S. Mason & Son.

It is, I think, very material that the dealings between the father and son should be thoroughly examined, much more deliberately than can be done at the time of trial. At present they are secret between themselves, except so far as the son has chosen to state. If what the son states is true, the father seems to have acted deceitfully towards the plaintiffs, and being the plaintiffs' grantor, I think that he should be examined, and produce all his books and papers for examination. It is surely in the interests of justice.

I think, even, that if the plaintiffs had sought it—viewing the relation of the father to the plaintiffs—the apparent fraud he has been party to in the transaction, and also his relations to the son in that transaction, that the father might have been made a defendant under rule 109. And I also think that where a party might be made a defendant under that rule on the ground of his being a party to a fraud in the transaction—he being the grantor of both claimants—that that fact is decisive of his liability to be examined under rule 285.

The defendant appealed from this decision. The appeal was argued by the same counsel.

GALT, J., dismissed the appeal, and affirmed the Master's order. Costs in the cause.

GARNER V. TUNE ET AL.

Counter-claim—Close of pleadings—Notice of trial—Rule 180.

The defendants by counter-claim delivered a reply, which contained more than a mere joinder of issue, to the statement of defence and counter-claim of the original defendants. No subsequent pleading having been delivered, the defendants by counter-claim, after the lapse of four days, served notice of trial.

Held, that the pleadings were not closed, and the notice of trial was therefore irregular. The plaintiffs, by counter-claim, were entitled under Rule 180 to twenty-eight days from the delivery of the defence and counter-claim in which to amend.

[October 13, 1887—*The Master in Chambers.*]

[October 17, 1887—*Galt, J.*]

THIS was an action arising out of an agreement between Thomas Tune & Son, the defendants by original action, of the one part, and Mrs. E. A. Garner, the plaintiff by original action, and her husband, L. V. Garner, of the other part.

On the 23rd September, 1887, the defendants delivered their defence, and in the same pleading counter-claimed against the plaintiff and her husband, who, on the 28th September, delivered a joint reply (not a mere joinder of issue) to the statement of defence and counter-claim. On the 6th October—no subsequent pleading having been delivered meanwhile—the Garners gave notice of trial for the Assizes at Welland, commencing on the 17th October.

The defendants by original action now moved to set aside the notice of trial as irregular, in that it was served before the close of the pleadings.

Echlin, for the motion. Rules 174, 175 apply only to the original action, and do not affect the counter-claim. The reply was in reality a defence to the counter-claim; and the plaintiffs by counter-claim have the same time to reply to it as the plaintiff by original action would have to reply to the statement of defence; or, at all events, would have twenty-eight days from the filing of the defence, under Rule 180.

German, contra. The defendants Tune & Son not having amended their defence and counter-claim within four days from the delivery of the reply, and not having obtained leave to plead thereto, the pleadings in both action and counter-claim were closed by lapse of time on the 3rd October, and the notice of trial was therefore regular.

THE MASTER IN CHAMBERS.—The point in issue arises out of a misconception of the meaning of the word “reply” in the rules referred to. A third party having been brought in by counter-claim, and he and the original plaintiff having pleaded to the statement of defence and counter-claim, and not simply joined issue, the plaintiffs by counter-claim cannot be deprived of their right to answer or plead to the reply of the defendants by counter-claim, which is virtually a statement of defence. The plaintiffs by counter-claim are at least entitled, under Rule 180, to twenty-eight days from the delivery of the defence and counter-claim in which to amend. The notice of trial must be set aside.

The defendants by counter-claim appealed to a Judge in Chambers.

Beck, for the appeal.

Echlin, contra.

GALT, J., dismissed the appeal, agreeing with the decision of the Master in Chambers.

RE McRAE AND THE ONTARIO AND QUEBEC RAILWAY
COMPANY.

*Costs—Taxation—Appeal—Arbitration—Witnesses—Subpœnas—R. S. C.
ch. 109, sec. 8, sub-secs. 22, 23.*

By the Dominion Railway Act, R. S. C. ch. 109, sec. 8, sub-sec. 22, the costs of an arbitration as to the value of land expropriated for a railway may be taxed by the Judge. The Judge in this case, by an order not appealed against, referred the taxation to a taxing officer.

Held, that the question whether the Judge had power to delegate the taxation could not be raised, and that an appeal lay from the taxing officer to the Judge.

By sub-sec. 23 of sec. 8 of the Act, "the arbitrators * * may examine on oath * * the parties, or such witnesses as may voluntarily appear before them." In this case subpœnas were issued, and witnesses attended upon them and were examined.

Held, that there was no power to compel the attendance of witnesses, and those who attended must have done so voluntarily; there was no power, therefore, to tax the subpœnas as such, but as they operated as notices, the proper costs of notices should be allowed, and also the costs of the attendance of the witnesses.

[November 9, 1887.—*Proudford, J.*]

AN appeal by McRae, a land-owner, from a ruling of Mr. Thom, one of the taxing officers, upon taxation of the appellant's costs of an arbitration under the Dominion Railway Act, for the purpose of awarding compensation to the appellant for land expropriated by the Ontario and Quebec Railway Company. The officer refused to tax the appellant's costs of procuring the attendance of witnesses before the arbitrators, upon grounds which appear in the judgment.

Aylesworth, for the appellant.

J. M. Clark, for the respondents.

PROUDFOOT, J.—This is an appeal from the taxing officer for refusing to tax the costs of witnesses who have appeared before arbitrators to give evidence as to the value of land taken by the railway.

It is objected that no appeal lies from the taxing officer in a matter of this kind. As an appeal is expressly given by the Judicature Act, rule 447, the objection must mean

that the taxing officer has no power to tax. The Railway Act indeed says that the costs are to be taxed by the Judge (a). The Judge has referred it to the taxing officer; whether that be within his power under the Act, or by virtue of inherent jurisdiction, is not now the question, for the Judge's order of reference has not been appealed from, and I must assume that it was in every respect regular and competent.

But it is said that the witnesses were subpoenaed, and did not attend voluntarily, while the Act only gives the arbitrators power to examine witnesses who attend voluntarily (b). That appears to be so under the Dominion Railway Act, and the phrase has been retained for many years in the various Railway Acts of Canada. And no authority seems to be given to the arbitrators to summon witnesses, or to issue subpoenas, or to apply to a Court to issue them, as in the Ontario Railway Act. I do not know how the subpoenas in this case were issued, but there would seem to be no authority to tax them as subpoenas.

Assuming then that there was no power to compel the attendance of witnesses, those who attended must have done so *voluntarily* and not under compulsion, for the subpoena had no force, and no penalty was incurred by refusing to obey it. The costs of their attendance, therefore, should have been allowed.

Though there was no authority to tax the subpoenas as such, yet a notice would be required to inform the witnesses of the time and place of the meeting of the arbitrators, and they would have that effect, and the proper sums as for notices should have been allowed.

Modifying the taxation in this way, I allow the appeal, with costs.

(a) R. S. C. ch. 109, sec. 8, sub-sec. 22.

(b) R. S. C. ch. 109, sec. 8, sub-sec. 23—"The arbitrators * * may examine on oath * * the parties, or such witnesses as may voluntarily appear before them."

BULL V. NORTH BRITISH CANADIAN INVESTMENT
COMPANY ET AL.

Appeal—Court of Appeal—Order of Judge in Court—Interlocutory order.

An order was made by a Judge sitting in Court, directing the execution by the defendants (mortgagees) of a reconveyance or discharge, directed by a previous judgment, or in default for a sequestration.

Held, that an appeal to the Court of Appeal lay without leave, whether the order was to be regarded as interlocutory or not.

Semble, per HAGARTY, C. J. O., and PATTERSON, J. A., that such an order is not in its nature interlocutory.

[November 10, 1887—*The Court of Appeal*.]

AN action brought by the plaintiff against a loan company and an insurance company, for a reconveyance of mortgaged premises, or a discharge of the mortgage thereon. The question was, whether the insurance company was entitled to an assignment of the mortgage under a subrogation clause in the policy of insurance on the mortgaged premises.

The judgment (14 O. R. 322) was for the plaintiff, holding that the insurance company was not entitled. The insurance company appealed, but the loan company, being merely stakeholders, did not do so.

The plaintiff, without notice to the insurance company, obtained an order from O'Connor, J., sitting in Court, compelling the loan company to comply with the judgment, or, in default, that a sequestration should issue against the latter company; from which order the loan company appealed to the Court of Appeal, without having obtained leave.

The plaintiff now moved to quash the appeal, on the ground that the order was not appealable at all, being interlocutory, and that, at all events, it was not appealable without leave.

C. Millar, for the motion.

J. MacLennan, Q.C., and *D. Urquhart*, contra.

THE COURT refused the motion, with costs, referring to the decisions in *Whiting v. Hovey*, 12 A. R. 119; *Hately v. Merchants' Despatch Co.*, *ib.* 640; *Conmee v. Canadian Pacific R. W. Co.*, *ib.* 744, and holding that, whether the order was or was not interlocutory, it was appealable, and that without leave.

If interlocutory, it was such an order as would have been appealable before the O. J. Act, and therefore would now be appealable under section 35. Leave was not necessary under section 33, because the title to real estate was affected by the order, or because the section was inapplicable to such a proceeding.

HAGARTY, C. J. O., and PATTERSON, J. A., expressed the opinion that the order was not in its nature interlocutory.

RE HILLYARD ET AL. AND THE ROYAL INSURANCE
COMPANY.

Arbitration—Costs—Taxation—Time and expenses in travelling—Amount of fees.

Upon an appeal from the taxation of costs of an arbitration, which the plaintiffs were ordered to pay:

Held, that items in respect of the loss of time in travelling and travelling expenses of an arbitrator were properly disallowed.

Held, also, that the amount to be allowed *per diem* to arbitrators and counsel was a matter peculiarly within the province of the taxing officer, and his decision should not be interfered with.

[November 5, 1887.—Galt, J.]

THE above named parties made a voluntary submission to arbitration. The arbitrators were J. H. Flock, barrister, of London, W. J. McMurtry, banker, of Port Hope, and A. J. Hewson, merchant, of Cobourg. The principal question referred was as to the value of a stock of dry goods, &c., destroyed by fire. The amount of the policy was \$3,500. The insured were awarded \$2,780, and were ordered by

the arbitrators to pay the costs. The arbitrators sat at Port Perry on the 23rd, 24th, and 25th of August in the forenoon, afternoon, and evening, and on the 26th in the forenoon and afternoon, when the evidence was complete. They also sat on the evening of the 26th to consider their award. They sat altogether about forty-one hours.

The Master in Chambers by order under R. S. O. ch 64, sec. 6, referred the taxation of the costs of the Royal Insurance Company to the local Registrar at Whitby, and an appeal by the company from such taxation was brought on before a Judge in Chambers.

The local Registrar made a memorandum or report, the material parts of which are as follows: "I do not think the matter was of such difficult, special, or important nature that the maximum should be allowed to either counsel or arbitrators. For the most part it was largely solicitor's work. I allow the fee to counsel in respect of six days of six hours each, being at the rate of \$15 per day. I allow a fee to the professional arbitrator, Mr. Flock, in respect of seven days of six hours each, of \$100. This is substantially at a similar rate *per diem*, the arbitrators having been engaged about six hours longer. I allow Mr. McMurry and Mr. Hewson \$50 each for the same time, of course, as Mr. Flock. These, in my opinion, are fair and reasonable allowances under the circumstances of this case. I disallow the items in respect of loss of time in travelling and travelling expenses."

The appeal was argued on the 22nd October, 1887, by

A. H. Marsh and *Hilton*, for the appeal.

Kappele, contra.

GALT, J.—This is an appeal from the decision of the local Registrar at Whitby on the taxation of a bill of costs of an arbitration between these parties in which the plaintiffs were ordered to pay the costs of the arbitration. There were three arbitrators, one of whom was a professional gentleman residing in London. The defendants

contend that the Registrar was wrong in disallowing the items in respect of loss of time in travelling and travelling expenses. In my opinion his decision is right; it appears to me most unreasonable to saddle the opposite party with such charges. Then, as to the *per diem* allowance, there is no complaint as to the manner in which the time has been computed, viz., allowing six hours *per diem*, although in my opinion some question might have been raised; but a question is raised as to the amount allowed *per diem* to the counsel retained and the arbitrators engaged on the reference. The amount allowed is considerably above the minimum mentioned in the statute, and the learned Registrar was of opinion that the subject matter was principally one of detail, as appears from his report. This was peculiarly within his province, and I see no reason why his decision should be set aside.

Motion dismissed. As the motion did not ask for costs, there will be no costs.

RE MONTEITH—MERCHANTS BANK V. MONTEITH.

Costs—Solicitor appointed by Master—G. O. Chy. 218.

During a reference in an administration suit the Master appointed the solicitor for one of the unsecured creditors of the estate in question to represent the general body of unsecured creditors. The Imperial Bank were unsecured creditors of the estate; they sent in a claim to the administrator in answer to the statutory advertisement for creditors, but did not prove their claim before the Master. The nomination of the one solicitor for the unsecured creditors was an *ex parte* proceeding, of which the bank were not notified till a year afterwards.

Held, that, in the absence of contract or of an order of the Master made under conditions contemplated by G. O. Chy. 218, the solicitor could not recover from the Imperial Bank any portion of the costs incurred on behalf of the unsecured creditors in contesting the claims of the secured creditors.

Held, also, that the doctrine of ratification by silence or inaction did not apply to a case like this.

Hall v. Laver, 1 Ha. 571, followed.

[November 4, 1887.—*The Master in Chambers.*]

[November 19, 1887.—*Boyd, C.*]

IN the course of a reference in this administration suit the Master in Ordinary appointed Mr. Paterson, who was acting as solicitor for one Parkes, an unsecured creditor of the estate being administered, to represent the general body of unsecured creditors. In the Master's office, and upon appeals from the Master, Mr. Paterson, on behalf of the unsecured creditors, contested the claims of the plaintiffs and other secured creditors to certain warehouse receipts, part of the assets of the estate, and incurred costs, a proportionate part of which he sought to charge against each of the unsecured creditors.

This was a motion by Mr. Paterson for an order upon the Imperial Bank of Canada for payment of their proportionate share of such costs.

The position of the Imperial Bank in regard to this claim sufficiently appears from the statements in the judgments.

J. A. Paterson, for the motion.

Kappele, contra.

THE MASTER IN CHAMBERS.—I cannot see that the Imperial Bank is liable to the applicant for any portion of his costs.

It is true that Mr. Paterson was at an early stage of the case appointed by the Master as the solicitor of the unsecured creditors, to conduct the litigation on their behalf in the Master's office in this matter. That is under G. O. Chancery 218. But that order must apply to contesting parties.

What the bank did in the matter was this. When, after Monteith's death, the solicitor of the administrator advertised, calling upon creditors to bring forward their claims the bank, on the 14th November, 1883, put in its claim to \$1,044, by sending it to the solicitor of the administrator. The advertisement had appeared on the 4th October. On the 6th of October an order for administration of the estate was made; but no advertisement was published in the administration suit until the following January. That is all the bank ever did as to its claim. It never filed or proved the claim in the Master's office, was never represented there, nor ever desired to be. It never received any notice of any appointment or meeting there, and never was one of the contesting creditors before the Master, and indeed Mr. Wilkie, the cashier, swears that he considered the contention of Mr. Paterson as to the warehouse receipts very much against the interest of the bank.

But then Mr. Paterson puts the case upon acquiescence, and relies on the receipt by the bank of his letter (put in) of the 29th January, 1885.

The bank took no course upon that letter. Mr. Wilkie, the cashier, thought it did not require attention or answer, and the bank did not attend the proposed meeting. How this, under the then circumstances in which the bank stood, can be looked upon as implying acquiescence in the appointment of Mr. Paterson as their solicitor, I cannot see.

I will repeat that the bank had simply sent in its claim to the solicitor of the administrator. As to proceedings in

the Master's office, the bank had nothing to do with them, never appeared there, nor had notice to appear there, and never were contesting parties as to the matter for which Mr. Paterson was contending.

An appeal from this decision to a Judge in Chambers was argued on 14th November, 1887.

Hoyles, for the appellant.

Kappele, for the respondent.

BOYD, C.—G. O. 218 is that upon which the power of the Master rests to appoint one solicitor to represent a number of parties who have a common interest. It is taken from an English order passed in 1850 (3rd June, Order 2.) See Consolidated Order XXXV. Rule 20, which is a little more fully worded, but both very clearly indicate the scope of the Master's powers. He must act during a reference and upon notice to those who are the parties appearing separately. These then being summoned before him have an opportunity of agreeing upon the common solicitor—if they fail to agree the Master can then nominate him. In either of these cases there would be a direct connection between the parties and their common solicitor, which would create an individual liability on their part equivalent to a retainer. But here the creditor sought to be charged did not even prove his claim before the Master—it was sent in to the administrator pursuant to the statutory notice and allowed apparently as a matter of course.

The nomination of the one solicitor for the unsecured creditors appears to have been an *ex parte* proceeding, of which this creditor was not notified till a year afterwards. The intimation then given was that, in view of a contemplated appeal, the solicitor thought it "the proper thing to do in this present case not to bring any appeal without the creditor knowing the circumstances of the case and having an opportunity to express his views." The creditor did not attend, and did not pay any attention to the notice.

It would have been better if he had intimated his disapproval or disavowed his liability for what was being done ; but his abstinence cannot, I think, affix liability upon him as if he had retained the solicitor. In the absence of contract or of an order of the Master made under conditions contemplated by General Order 218, I do not think the solicitor can recover any portion of the solicitor and client costs, or taxed costs, from the respondent, and the appeal fails.

The doctrine of ratification by silence or inaction referred to in *Reynolds v. Howell*, L. R. 8 Q. B. 398, does not apply to a case like this where the creditor was not in any sense a *party* to the proceedings, and where there were a number of others who might choose to authorize the solicitor to litigate in their interest along with his own proper clients. I am bound by the authority of *Hall v. Laver*, 1 Ha. 571. which decides that the fact that a party (knowing that his name has without authority been used as plaintiff by the solicitor of some other plaintiffs) does not take any active steps to have his name expunged, is not, as between that party and the solicitor, equivalent to a retainer or an adoption of the latter as his solicitor, so as to entitle the solicitor to recover personally any deficiency for costs not covered by the fund realized in that suit.

If the Master has not given costs to the Imperial Bank, they should get costs of this appeal—otherwise not.

HANDS V. UPPER CANADA FURNITURE COMPANY ET AL.

Examination—Exclusion from examiner's chambers—Exhibits.

Upon an examination before a special examiner at his chambers :—(1) The examining counsel has no right to have a clerk present to assist him, if the opposite party objects.

(2) If documents are produced by the party under examination, the opposite party is entitled to have them marked as exhibits.

(3) It is within the discretion of the examiner to exclude from his chambers even the solicitor for the examinant, if his presence interferes, in the examiner's opinion, with the due execution of his duty as examiner.

[November 22, 1887.—*The Master in Chambers.*]

A MOTION by the defendants Wm. Beatty & Son to obtain the opinion of the Master in Chambers as to whether certain rulings of W. D. Gwynne, special examiner, upon the examination of the plaintiff for discovery, were correct.

The plaintiff was the claimant of goods seized by the defendants under executions against her husband, J. B. Hands, and an interpleader issue was directed in which she was plaintiff, and the execution creditors were defendants.

On the examination Mr. Echlin appeared as counsel for Wm. Beatty & Son, at whose instance the examination was had, and Mr. Hands, who was a barrister and solicitor, for his wife, the plaintiff.

Mr. Hands objected to Mr. Echlin's clerk being present. Mr. Echlin stated that he required his assistance in copying exhibits and sorting his papers. The examiner sustained the objection, and requested Mr. Echlin's clerk to withdraw.

Mr. Echlin took objection to Mr. Hands's presence as likely to influence the plaintiff, and prevent a fair examination. The examiner ruled that Mr. Hands was entitled to be present as the plaintiff's solicitor.

The examination proceeded, subject to the objections, and the plaintiff stated that she based her claim to the goods seized upon marriage articles, and a subsequent bill of sale, and also claimed that some of the goods were hers outside of these documents. The plaintiff produced the marriage

articles, the bill of sale, and other documents, but she and her husband refused to allow them to be marked or filed as exhibits; they did not object to counsel for the defendants having them to look at. The examiner ruled that all the papers produced on the examination should be marked by him as exhibits.

The examination was then adjourned, and the rulings were submitted to the Master.

Hands, for the plaintiff.

Echlin, for the defendants Wm. Beatty & Son.

THE MASTER IN CHAMBERS.—Of the four questions as to which the parties requested me to express an opinion, three only remain :

1. As to the examiner ruling that Mr. Echlin's clerk could not be present, upon the objection of the opposite party; I think the examiner was quite right.

2. As to marking the exhibits produced, as produced upon the examination, with the date; I think the examiner was quite right.

3. As to the third question, Mr. Hands, the husband of Mrs. Hands, is her solicitor in this suit; and the objection came from the defendants that he should not be present on Mrs. Hands's examination in the suit.

I understand the learned examiner was of opinion that the fact that Mr. Hands was the solicitor of the examinant, took from him all discretion in the matter, that Mr. Hands had the right to be present as such solicitor, at the desire of Mrs. Hands.

I do not mean at all that the examiner was wrong in allowing Mr. Hands to remain, but I do think that it would be within the discretion of the examiner to say that he should not be present, notwithstanding the fact of his being the examinant's solicitor in the cause, if the examiner saw that from his conduct his presence interfered with the due taking of the examination. I have not heard that Mr. Hands's presence did in any manner interfere with the

proper execution of the order; and I do not mean to insinuate that it did so. But I do wish to express that I think the examiner must have, according to circumstances, a discretion to forbid the presence of any one whose presence would, in his opinion, interfere with the due execution of his duty as examiner.

RE MCQUILLAN AND THE GUELPH JUNCTION RAILWAY
COMPANY.

Arbitrator—Disqualification—R. S. C. ch. 109, sec. 8, sub-sec. 28—"The Judge"—Divisional Court—Appeal—Certiorari.

A motion was made to Galt, J., under R. S. C. ch. 109, sec. 8, sub-sec. 28, to determine the validity of the cause of disqualification urged by land-owners against the arbitrator appointed by a railway company under the provisions of the Act. The objection was, that the arbitrator was a ratepayer of a city largely interested in the railway company as a shareholder and creditor. He was not himself a shareholder, nor had he any personal interest in the matter, except as a resident of the city, in which he had no real estate, and was assessed on income only.

Held, by GALT, J., that the arbitrator was not disqualified.

Held, by the Chancery Divisional Court, that no appeal lay to a Divisional Court from the decision of the Judge acting under the statute.

Held, also, that the Divisional Court had no power to remove the proceedings by *certiorari*.

[October 29, 1887.—*Galt, J.*]

[December 7, 1887.—*The Chancery Division.*]

THESE were three arbitrations under the Dominion Railway Act, R. S. C. ch. 109, in respect to land belonging to three persons named McQuillan, required for the purposes of the Guelph Junction Railway Company. The company named as their arbitrator under the Act Mr. McKinnon, the Local Master of the Supreme Court of Judicature at Guelph, but the land-owners objected to Mr. McKinnon, on the ground that he was a person interested as a corporator and ratepayer of the city of Guelph, which was a shareholder and creditor of the company.

The land-owners applied under the Act, sec. 8, sub-sec. 28, to Galt, J., to determine the validity or invalidity of the cause of disqualification urged against Mr. McKinnon.

J. L. Murphy, for the application. The city of Guelph is in fact the railway company. Only \$1,000 of the company's capital has been paid by other subscribers, and these are citizens of Guelph. The city's interest is \$20,000 as a shareholder, and \$155,000 as a creditor, and the other stockholders are released from liability for the loan. The amount is to be raised by yearly assessments within twenty years on all the ratable property in the municipality. Mr. McKinnon is a member of the corporation and a ratepayer, and is interested to reduce the amount payable to the applicants, who are foreigners to the corporation. An arbitrator whose office combines the duties of judge and jury ought to be an indifferent person between the disputants: referring to the following authorities: *Re Muskoka and Gravenhurst*, 6 O. R. 352; *Queen v. Commissioners of Sewers for Essex*, 14 Q. B. D. 561, 578; *Re Elliott*, 12 Jur. 445; *Widder v. Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 520, 543; *Dimes v. Proprietors of Grand Junction Canal*, 3 H. L. C. 759; *Day v. Savage*, Hob. 87; *Domat's Public Law*, (Strahan's ed.) Bk. 2, Tit 4, sec. 4, sub-sec. 14; *Broom's Maxims*, 5th ed., 116-122; *Grant on Corporations*, 194; *Russell on Awards*, 5th ed., 107, 109.

Aylesworth, contra. The Legislature has amended the law to meet the decision in *Re Muskoka and Gravenhurst* and the objection is thereby removed: 48 Vic. ch. 39, sec. 9, (O.) The interest disclosed is too slight to affect the judgment of the arbitrator, and the maxim *de minimis, non curat lex* is applicable. A ratepayer may be arbitrator for his corporation: *Taylor v. County Commissioners*, 105 Mass. 219; *State v. Crane*, 36 N. J. L. R. 394.

GALT, J.—There are three cases between the company and three different parties. The application is, "that the arbitrator named by the above named railway company on its behalf herein is disqualified to act as such arbitrator on the ground of interest." The application was supported by Mr. Murphy, and cause shewn by Mr. Aylesworth.

The objection raised to the gentleman named as arbitrator is, that he is a ratepayer in the city of Guelph, and that the city of Guelph is largely interested as a shareholder and as a creditor of the company. The arbitrator named is not a shareholder in the company, nor has he any personal interest in the matter, beyond the fact that he resides in the city of Guelph and is assessed on his income; he is not a proprietor of any real estate, but is tenant of a residence. In my opinion there is no force in the objection, and these applications must be dismissed. There will be no costs, as the motion does not ask for costs.

The land-owners then served notice of appeal to a Divisional Court from the decision of Galt, J., and the appeal came on to be heard on the 7th December, 1887, before Boyd, C., Proudfoot and Ferguson, JJ. The land-owners also moved in the alternative, in case the Court should be of opinion that no appeal lay, for a *certiorari* to remove the proceedings into the Divisional Court, in order that the decision of Galt, J., might be quashed or rescinded as made in excess of his authority as a special tribunal under the Railway Act.

J. L. Murphy, for the land-owners.

Aylesworth, contra, was not called upon.

BOYD, C., referred to *Re Allen*, 31 U. C. R. 458; *Re Sheffield Water Works Act*, L. R. 1 Ex. 54; *Re Kingston and Pembroke R. W. Co. and Murphy*, 11 P. R. 304; *Re Moorehouse and Leak*, 13 O. R. 290; *Smeeton v. Collier*, 1 Ex. 457; and said that no appeal lay. The Divisional Court had a certain definite statutory jurisdiction; it could entertain an appeal from a Judge in Chambers; it could not entertain an appeal from a Judge in Court. What was there here to shew that Mr. Justice Galt was acting as a Judge in Chambers? He was acting under the Railway Act. By sec. 8, sub-sec. 1, the expression "Judge," in that section means a Judge of the Supe-

rior Court of the Province. Sub-sec. 28, says that, "The validity or invalidity of any cause of disqualification * * shall be summarily determined by *the Judge*." The parties have a much wider choice than they had under the C. S. C. ch. 66, sec. 11. Under that enactment they could apply to the County Judge only; now they have the choice of one out of ten Superior Court Judges, and when they have chosen one, he summarily determines the matter under the Act. In doing so he is not exercising his jurisdiction as a Judge in Chambers, or as the Court, but a special statutory jurisdiction as *persona designata*. We think there is no jurisdiction to entertain this appeal. This is not the place to move for a *certiorari*. We are now exercising functions of an appellate nature only. But apart from this there is no excess of jurisdiction to found the right to a *certiorari*. There should be no costs.

PROUDFOOT and FERGUSON, JJ., concurred.

Motion dismissed.

RE IRVINE, A SOLICITOR.

Attachment of debts—Order for costs.

The person to receive payment under an order for payment of costs only is entitled to an order attaching debts due or accruing due to the person to pay.

Any doubt existing upon the English cases and the O. J. Act Rules, is cleared up by R. S. O. ch. 66, sec. 72.

[December 16, 1887.—*The Master in Chambers.*]

A petition for payment over of money, &c., by the solicitor was dismissed by an order of the Court, with costs to be paid by the petitioner to the solicitor, who taxed his costs, and now applied for an attaching order upon certain moneys due to the petitioner, and for a garnishing summons.

W. M. Douglas, for the solicitor, referred to Rules 366 to 378.

THE MASTER IN CHAMBERS.—I think section 72 of the Execution Act, ch. 66 R. S. O., puts an end to any doubt which might have existed on the English cases and our own rules, without the aid of that clause. The person to receive payment under such an order for payment of costs as that in the present case is entitled to writs of *fiery facias*, &c., against the property of the person to pay, and is further entitled to enforce payment of the debts of, or accruing to the person to pay, in the same manner as in the case of a judgment at law in a civil action.

RE ALPHA OIL COMPANY.

Company—Winding-up—Appointment of liquidator—Costs.

Upon a contest for the appointment of liquidator in a winding-up proceeding it is desirable to follow the rules for guidance to be found in the English cases under the Winding-up Acts. The Court abstains from laying down any such rule as that the nominee of the petitioning creditors should have a preference. The Court will consider the condition of affairs to ascertain what parties are most interested in the due administration of the estate in liquidation, and other things being equal will act upon their recommendation.

And where upon an application under the Dominion Act, the creditors were those whose interests were most to be regarded, and the great bulk of them favoured the appointment of the sheriff of Lambton, and opposed the nominee of the petitioning creditors, and the sheriff resided in the county where the company's operations were carried on, and where all its books and assets were, was already *de facto* liquidator under voluntary proceedings taken pursuant to the Ontario Act, and was otherwise well qualified for the position, the Court appointed him liquidator. The rule as to costs suggested in *Re Northern Assam Tea Co.*, L. R. 5 Ch. App. 644, followed.

[December 14, 1887.—*Boyd, C.*]

UPON an application for an order for the winding-up of the company under the Dominion Act, a contest arose over the appointment of a liquidator; the petitioning creditors being in favour of a Toronto accountant, and the

majority of the other creditors of the Sheriff of Lambton, who was already acting as liquidator under voluntary proceedings pursuant to the Ontario Act, and in whose bailiwick the company's business had been carried on, and its books and assets now were.

Arnoldi, for the petitioning creditors.

Hoyles, for the company and certain of the shareholders.

C. J. Holman, for the sheriff and certain of the creditors.

BOYD, C.—Upon the contest for the appointment of liquidator it is desirable to follow the rule for guidance to be found in the English cases under the Winding-up Acts. The Court abstains from laying down any such rule as this: that the nominee of the petitioning creditors should have a preference. The reasons are of a two-fold character as given by Giffard, L. J., in *Re Northern Assam Tea Co.*, L. R. 5 Ch. Ap. 644, 647, (1) it would be throwing out an additional bait for trafficking in petitions of this description; and (2) because the plaintiff in a winding-up is very different from the plaintiff in a suit. The latter, though a receiver be appointed, is still *dominus litis*, and has the carriage of the proceedings, whereas the official liquidator displaces the petitioner, and becomes *dominus litis*. See also *Re Hayland Co.*, W. N. 1884, p. 13, by Pearson, J. The Court will consider the condition of affairs to ascertain what parties are most interested in the due administration of the estate in liquidation, and other things being equal, will act upon their recommendation. Here, the creditors are those whose interests are most to be regarded, and the great bulk of creditors favour the appointment of the sheriff. It is said that many of the claims of these creditors will be disputed, but whether that be so or not, it is certainly the fact that a great preponderance of the creditors oppose the nominee of the plaintiffs. It is not without some weight that the sheriff is already *de facto* liquidator under the voluntary proceedings taken pursuant to the Ontario Act, although it may be that those proceed-

ings were irregular or invalid. But a more influential consideration is that the sheriff is resident in the county where the company's operations were carried on, and where all its books and assets are. It is not necessary to compare his experience and qualifications with those of the gentleman supported by the plaintiffs—it is enough to say that either of these nominees is well qualified and competent to be the liquidator. By appointing the sheriff, I think I ensure the effective and more economical winding-up of the concern. In my judgment the sheriff is the proper person to be the liquidator of this company, and I appoint him upon giving such security as may be agreed upon by the creditors, to be fixed by the Master at Sarnia, in case of difference.

I follow the rule suggested as to costs in *Re Assam Tea Co.*, and give the costs of this application, as to appointment of liquidator only, to the successful creditors—one set of costs as party and party costs, out of the estate. Any costs properly incurred by the sheriff, heretofore, to be allowed out of the estate.

The costs of the winding-up order to be given to the petitioning creditors as usual.

THE BRITISH CANADIAN LUMBERING AND TIMBER
COMPANY V. GRANT.

Company—Winding-up—Order of foreign Court—Defence—Res judicata.

In the course of proceedings taken in Scotland for winding-up the plaintiffs' company, an order was made by a Scotch Court for delivery by the defendant, as one of the officers of the company, of certain books and papers said to be in his hands, and it was provided that in case of default the liquidator might proceed against the defendant, who lived in Ontario, in any Court in Ontario having authority to compel delivery, and upon default this action was brought for that purpose.

Held, that there was and could be no final adjudication of rights by the order, for it could only be operative by enforcing it against the person of the defendant by attachment for disobedience, and such enforcement could not be of extra-territorial efficacy. There was no power in a winding-up proceeding to pronounce an order equivalent to a final judgment on the merits, based upon service of a person out of the jurisdiction of the Scottish Court.

And an order striking out the defence in the action on the ground that it was *res judicata* by the order of the Scottish Court was rescinded.

Semble, that the order of the Scottish Court should have been limited to such books and papers as were in the hands of the defendant at its date.

[December 14, 1887.—*Boyd, C.*]

THE plaintiffs were a Scotch company, incorporated under the Imperial Joint Stock Companies' Act, 1862, to carry on the lumbering business in Canada.

The head office of the company was in Edinburgh, Scotland, and the head office for Canada was in Toronto, but the company carried on an extensive business in the Ottawa district, and had an office in the city of Ottawa under the superintendence of the defendant. At this office were kept books of account, showing all transactions in connection with the Ottawa business, and to this office reports were made of the business done up the Ottawa river at the shanties. The company also had a large mill at Ottawa, and the reports were made from the mill to the office in Ottawa. Large sums of money were paid out and received by the officers at Ottawa, and these transactions all appeared in the books kept at the Ottawa office under the defendant.

The company went into liquidation in Edinburgh, Scotland, in the month of April, 1884, and the liquidation

was ordered to be carried on, under the supervision of the Court of Session, Edinburgh, by one Chiene, who had been appointed liquidator of the company.

The liquidator presented a petition to the Court of Session, Edinburgh, asking for an order compelling the defendant to deliver up to him or to his agent the books, papers, and documents in his possession belonging to the company. When this petition came before the Court of Session, it was ordered that notice of the application should be served on the defendant in Ottawa, and the case was adjourned for sufficient time to give the defendant an opportunity to appear and oppose the petition if he desired to do so.

The petition, with a notice endorsed on it that an application would be made after four weeks from service for an order calling upon the defendant to deliver up to the liquidator, or his duly authorized agent in Canada, the whole of the books, papers, or other property or effects which belonged to the company and were in the defendant's custody, or within his control, or had been in his custody or within his control, at or since the date of the liquidation of the company, and also stating that the court would be asked to authorize the liquidator or his agent in Canada, in the event of the defendant refusing or failing to give up the said books, papers, and documents, to proceed against the defendant in the proper court in Canada having authority to deal with the matter, was duly served personally on the defendant, and after the expiry of the four weeks the Court of Session was again moved for an order against the defendant in the terms above mentioned. The defendant failed to appear, and the Court of Session, thereupon, on the 4th of March, 1887, made the following order :

"Edinburgh, 4th March, 1887. The Lords having resumed consideration of the note for the liquidator, No. 41 of process, with the certificate endorsed on the copy thereof, No. 44 of process, of intimation made in terms of the preceding interlocutor, to Allan Grant, now or lately lumber

merchant, Ottawa, Canada, ordain him to deliver up to W. H. Lockhart Gordon, solicitor, Toronto, or to such other person as the liquidator shall authorize to receive delivery thereof, the whole books, papers, or other property or effects which belong to the British Canadian Lumbering and Timber Company, Limited, and are in his custody or within his control or have been in his custody or within his control at or since the 21st day of April, in the year 1884, when the company went into liquidation: Authorize the liquidator and the said W. H. Lockhart Gordon, or other person duly authorized by the liquidator, in his and the company's name, in the event of the said Allan Grant failing to comply with this order, to proceed against him in the High Court of Justice in Canada, or other Court having authority to compel delivery of the said books, property, and effects; and decern *ad interim*."

The defendant was duly served with this order, but having still refused to give up the said books, papers, and documents, an action was commenced by the company against the defendant to enforce their delivery.

The plaintiffs' statement of claim recited that the company was a British Company, incorporated under the Imperial Companies' Act, 1862, and that the company was being wound up in Edinburgh under the supervision of the Court of Session, Edinburgh, which the statement of claim stated was the Court having jurisdiction in that behalf. The statement of claim further stated the presentation of the above petition to the Court, the order of the Court to serve same on the defendant, and the second application to the Court after service of the same on the defendant: it then set out verbatim the order made by the Court on the 4th day of March, 1887, and also the 100th section of the Imperial Companies' Act, 1862, which was as follows:

"The Court may, at any time after making an order for winding up a company, require any contributory for the time being settled on the list of contributories, trustee, receiver, banker, or agent, or officer of the company to pay

deliver, convey, surrender, or transfer forthwith, or within such time as the Court directs, to or into the hands of the official liquidator, any sum or balance, books, papers, estate, or effects which happen to be in his hands for the time being, and to which the company is *primâ facie* entitled."

It further alleged that the defendant had not delivered up the books, papers, and documents in pursuance of the order, and prayed that an order be made by the Court directing the defendant forthwith to deliver up to the plaintiffs the said books, papers, and documents and other property that he had in his possession at the time of the liquidation of the said company, and for such further and other relief as under the circumstances might seem fit.

To this statement of claim the defendant pleaded that long before action brought the said books, papers, and documents had been delivered over to and taken possession of by the company, and that the same or any part or portion thereof have not since been and are not now in the custody or control of the defendant. The defendant further set up that as the order authorizing the action directed that proceedings should be taken by the liquidator and by Mr. W. H. Lockhart Gordon, or other person duly authorized by the liquidator, in his and the company's name, that the action was not properly brought in the name of the company alone.

The plaintiffs moved in Chambers for an order striking out this statement of defence, on the ground that this being an action on a judgment obtained against the defendant in proceedings taken against him before the Court of Session, Edinburgh, Scotland, and of which he had due notice (personally served on him) the defendant ought not now to be able to plead the said defence. The Master in Chambers, following the case of *Barned's Banking Co. v. Reynolds*, 36 U. C. R. 256, thought that this order was a foreign judgment and that the defence should be struck out.

From this order the defendant appealed to a Judge in Chambers, and the appeal was argued on the 12th December, 1887.

Hoyles, for the appeal, argued that there was no allegation in the statement of claim that the order was final; nor was it sufficiently alleged that the Court of Session had jurisdiction in this matter. He further pointed out that the order was misleading, and appeared to be more of a notice to the defendant that proceedings would be taken against him in Canada than a judgment compelling him to give up the books, papers, and documents. He also argued that as the plaintiffs' remedy, in the event of the defendant refusing to give up the books, papers, and documents, would be by attachment here, it would be unfair to the defendant to commit him to prison without giving him an opportunity to raise his defence in Canada; and that the defendant being a poor man, it was not right that he should be compelled to go to Scotland to defend this case there; and that he ought to have an opportunity of defending it in Canada. He also referred to the report of *Barned's Banking Co. v. Reynolds*, in *Cassels's Digest of Supreme Court Cases*, p. 92, shewing that the case as reported in 36 U. C. R. had been reversed. He also argued that as the order directed that the action to be brought in Canada was to be brought in the name of the liquidator or Mr. Gordon, and the company, it was not properly brought in the name of the company alone.

W. H. Lockhart Gordon, in support of the order made by the Master, relied on *Barned's Banking Co. v. Reynolds*, as reported in 36 U. C. R. He pointed out that this case had been reversed in the Supreme Court, not because the court thought that an order made by a court in Great Britain under the Winding-up Act could not be sued upon here as a final judgment, but on the ground that the defendant in *Barned's Banking Co. v. Reynolds* was being sued as a past member of the company, under the provisions of the Winding-up Act which made past members liable if present members were not able to pay in full their contributions, and that the liability of the defendant being one made by statute, an order made

under the Winding-up Act in England, could not create any liability in Canada. He also relied upon *Howell v. The Dominion of Canada Oils Refinery Co.*, 37 U. C. R. 484, and *Louth v. Western &c. Oil Lands Co.*, 22 Gr. 557. He contended that the order in this case was a final judgment, and that it was sufficiently alleged to be such in the statement of claim. He further contended that the cases above mentioned showed that the courts would do all they could here to assist the courts in Great Britain by giving effect to and enforcing their judgments.

BOYD, C.—The order of the Master should be reversed, and the defence herein reinstated. The question between the parties is as to the recovery of books and papers said to be in the hands of the defendant, as one of the officers of the company now in process of being wound up in Scotland under the Companies' Act of 1862. An order was made for the delivery of those documents by the second division of the Court of Session on 4th March, 1887. It was by this order provided that in case of default, the liquidator might proceed against Grant in any Court in this Province having authority to compel delivery. This was merely an enabling order, by virtue of which the liquidator would be justified in taking proceedings in Ontario, and protected as to his costs. There was and could be no final adjudication of rights thereby, for that order could only be operative by enforcing it against the person of Grant by attachment for disobedience, and such enforcement cannot be of extra-territorial efficacy.

If it is argued that this order to deliver documents is a final judgment on the merits, then it appears to me there was no power to make such an order based upon service of a person, whether officer or not of the company, out of the jurisdiction of the Scottish Court. Orders equivalent to judgments cannot be made under the Winding-up Acts so as to affect non-residents. There is no provision made in those Acts for service out of the jurisdiction in such cases, and as put by Cotton, L. J., in *Re Busfield*, 32

Ch. Div. at p. 131, "apart from statute a Court has no power to exercise jurisdiction over any one beyond its limits." The cautionary notice first given to the defendant Grant, it was perhaps competent to serve, because it did not purport to affect his rights or his person, but this order made thereupon in his absence cannot now be used to conclude his defence on the merits. Upon this point compare the cases of *Re Newman*, 35 Ch. Div. 1, and *Re Anglo-African Steamship Co.*, 32 Ch. Div. 348. The order for delivery of the documents simply forms a starting-point for the present litigation, in which this Court, according to the ordinary law of comity, will recognize and aid the winding-up proceedings in Scotland. But before the defendant can be attached for non-obedience to an order to produce and hand over books and papers, it must appear that he is in default by the judgment of this Court, obtained in the usual way after defence filed.

It would be most unjust to enforce literally the order made in Scotland without hearing the defendant. It transcends the power under which it purports to be made; sec. 100 of the Winding-up Act. That section refers to books and papers which happen to be for the time being in the hands of the officer, and to which the company is *prima facie* entitled. The order should follow that language and be limited to such as are in his hands at the date of the order. See General Order, Nov. 1862, sched. 3, No. 13, *Buckley*, p. 594. Here the order extends to the whole books, papers, or other property, or effects which belong to the company, and are in his custody or within his control or have been in his custody or within his control at or since the 21st day of April, 1884.

The law which is the nearest authority upon the main matter here is *Burned's Banking Co. v. Reynolds*. The ultimate result of that case, as noted in *Cassels' Digest* of Supreme Court, p. 92, supports my conclusion, that there is here nothing in the nature of a final judgment which can be set up in this action as *res judicata*, or which can

be so treated by the court as to oust the right of the defendant to make his full defence.

The costs of the appeal and of order below to the defendant in the cause in any event.

PIERCE V. PALMER.

Appeal—Waiver—Motion to extend time for complying with order appealed from.

By an order of Boyd, C., 12 P. R. 275, a motion by the defendant to set aside a judgment for irregularity was refused, but the defendant was let in to defend upon paying into Court or securing \$700 within a month. The defendant moved for and obtained an order extending the time for paying the money in, and then appealed from the part of the order refusing to set aside the judgment for irregularity. *Held*, that the defendant had waived his right of appeal from the order by obtaining an enlargement of the time for complying with it.

[December 21, 1887.—*The Chancery Division.*]

AN appeal by the defendant from an order of Boyd, C., in Chambers, 12 P. R. 275, affirming an order of the Master in Chambers refusing to set aside a judgment for irregularity, but allowing the defendant in to defend, upon his paying into Court or securing the sum of \$700 within a month.

The appeal came on to be heard before a Divisional Court composed of Proudfoot and Ferguson, JJ., on the 6th December, 1887.

Hoyles, for the plaintiff, objected that the defendant had waived his right of appeal by moving to extend the time for paying into Court or securing the \$700. The defendant had moved in Chambers and obtained an extension of the time. He referred to *Simpson v. Smyth*, 1 E. & A. at p. 49; *International Wrecking Co. v. Lobb*, 12 P. R. 207.

C. J. Holman, against the objection, referred to *Daniell's Chancery Practice*, 6th ed., 1277; *Masterman v. Price*, 1 C. P. Cooper 358; *Butlin v. Masters*, 2 Phil. 290; *Brophy v. Holmes*, 2 Molloy 1.

Hoyles, in reply, cited *Hayward v. Duff*, 12 C. B. N. S. at pp. 366, 367; *Hall v. Brown*, 3 P. R. 293.

PROUDFOOT, J.—We will hear the appeal subject to the objection.

Holman, for the appeal. The judgment signed upon the statement of claim delivered before the costs were paid was a nullity, not to be waived like an irregularity; *Doe d. McMillan v. Brock*, 1 U. C. R. 482; *Stock v. Shewan*, 18 C. P. 185. These cases were not cited to Boyd, C. The defendant should have been let in to defend unconditionally: *Dobie v. Lemon*, 12 P. R. 64.

Hoyles, contra, relied on the judgments of the Master in Chambers and Boyd, C., 12 P. R. 275, and upon *Lord v. Lee*, L. R. 3 Q. B. 404; *Carter v. Stubbs*, 6 Q. B. D. 116; Rule 462.

PROUDFOOT, J.—On the 6th May, 1887, by an order in Chambers the plaintiff was to be at liberty to file and serve his statement of claim upon payment to the defendant of the costs of that application, and had eighteen days given him to file his statement of claim and pay the costs.

Through some delay in the post-office, it is said, the money and statement of claim were not tendered to the defendant till the 26th May, one day later than that fixed by the order. The defendant's solicitors refused to accept the money, but received and kept the statement of claim, though refusing to accept service of it.

June 3rd, 1887. The plaintiff thereupon obtained an order extending the time for filing and delivering the statement of claim and paying the money, as ordered by order of 6th May, for one week from the date of the order, that would be till 10th June.

The money was paid under this order, but no statement of claim was served, the plaintiff relying upon the service on the 26th May.

On the 17th June the plaintiff signed judgment in default of a statement of defence.

September 14th, 1887, an order was made by the Master in Chambers dismissing an application of the defendant to set aside the plaintiff's judgment and to allow defendant to defend.

The defendant appealed from this order of the Master in Chambers, to the Chancellor, who on 28th September ordered that the defendant be allowed in to defend this action on paying into court the sum of \$700, or upon giving security to the satisfaction of the Registrar, &c., for payment of that sum to the plaintiff, in case he should recover judgment therefor within a month from the date of the order, and in default of paying that money into court or giving security, the appeal was to be dismissed.

November 3rd. The defendant applied for and obtained from the Master in Chambers an extension of time for giving security or paying into court for one month from date of order.

The defendant has neither paid the money into court nor given security for it; and he now appeals from the order of the Chancellor of the 28th September, relying upon the non-delivery of the statement of claim after order of the 3rd June.

I should have noticed that the defendant's solicitors on the 26th May sent a postal card to the plaintiff's solicitors saying that the statement of claim was not delivered in time, "therefore we must move to have statement set aside, unless you withdraw it at once." It was not withdrawn and no motion was made to set it aside.

A preliminary objection was made to the appeal that the defendant had waived any right to object to the order by obtaining an enlargement of the time for complying with it.

I think this objection must prevail. The delivering of the statement of claim on the 26th May, instead of after the 3rd June, was only an irregularity, the defendant's solicitors seem to have so understood it, and intimated

their intention of moving to set it aside. They did not do so and retained it in their possession.

An irregularity in the proceedings may be waived, and there are numerous cases to that effect. In *Larkin v. Armstrong*, 1 Ch. Chamb. R. 31, a party had delayed for one day beyond the time allowed for that purpose to give notice of appeal from the Master's report, and the other side, instead of moving to set the proceedings aside, served notice of a cross-appeal: it was held that he had waived the irregularity. So in *In re Merchants Bank v. Van Allen*, 10 P. R. 348, it was held that by appearing to a suit and taking part in the proceedings, a party waived the service of a summons or a copy of the plaintiff's demand; and in *Lock v. Todd*, 8 P. R. 60, Mr. Dalton, quite in accord with this principle, held that the obtaining an order for time to reply waived an objection that no notice to reply was served.

International Wrecking Co. v. Lobb, 12 P. R. 207; *Butlin v. Masters*, 2 Phil. 290, and *Keith v. Keith*, 25 Gr. 110, are perhaps not applicable to the present case, as they were cases of waiver after judgment or decree, while this is from an interlocutory order. But the defendant relies with much confidence on *Masterman v. Price*, 1 C. P. Cooper 358, as decisive in his favour. As stated by Osler, J., in *International Wrecking Co. v. Lobb*, that was an appeal from two orders, the first of which had directed certain inquiries before the Master, and the plaintiff had carried it into the Master's office and brought in two "states of facts," supporting them by affidavit. The Master made a report on which a further order was made, and the plaintiff appealed from both orders. The Chancellor said he could not hold the plaintiff was shut out from appealing from the first order merely because he had accepted the inquiries offered by it, carried it into the Master's office, and acted upon it to the extent described. The general rule deduced from this case by Mr. Daniell, vol. ii., 1335, is that a party does not lose the right of appeal by acting on an order. But that

is not the present case. The defendant has not done what he was required to do by the order. He has not paid the money into court. Had he done so, then *Masterman v. Price*, would probably have given him the right of appeal. But here, treating the order as perfectly regular, and under no compulsion from its terms, he applies to extend the time for payment. This conduct brings the case within the lines of the cases quoted above.

I therefore think that the irregularity has been waived, and that this appeal must be dismissed. Order affirmed, with costs.

FERGUSON, J., concurred.

Appeal dismissed.

RE SMART INFANTS.

Infants—Custody—Habeas corpus—Petition.

A father was proceeding by *habeas corpus* to obtain an order awarding him the custody of his infant children.

Held, that a more comprehensive adjudication could be had upon a petition, and that there was power to direct that a petition should be substituted for the *habeas corpus* proceedings.

Such a direction was given where it appeared to be in the interest of the infants and all concerned.

[November 25, 1887.—*Ferguson, J.*]

On the 23rd November, 1887, the trial as to whether the statements and allegations were true in the return made by Emilie Ardelia Smart, the mother of the infants, to a *habeas corpus* issued by David Smart, their father, was begun. The return is set out in a former report, 11 P. R. 482.

S. H. Blake, Q.C., and *H. Cassels*, for the mother, objected that where, as disclosed by the return in this matter, there has been an agreement between the father and mother, and the children are held pursuant to that agreement, there cannot be a *habeas corpus*.

H. J. Scott, Q.C., for the father, contra.

Upon this objection judgment was reserved, and was given on the 25th November.

FERGUSON, J.—Since the argument on Wednesday last, I have paid as much and as great attention to the subject submitted for consideration as the time and the circumstances surrounding me would permit. These arguments were clear, searching, and incisive. This motion or application appears to me to be one of the gravest possible importance.

There are some matters that seem to me to make it much more than ordinarily so.

In the matter of *Haliday's Estate*, 17 Jurist 56, the late Lord Justice Turner (then Vice-Chancellor) said: "Perhaps no question brought before the Court is more difficult to be dealt with than the preservation of the relations and rights of parent and child, and of husband and wife, with respect to the children," and I apprehend no Judge called upon to administer the law in such cases, and to do justice, so far as in him lies, under the provisions of the law, can fail to appreciate the truth and force of this remark, made as it was by so eminent a jurist. The case there was being considered upon a petition and under the statute, and the learned Judge said there were three grounds to be borne in mind in deciding any case under the Act. The paternal right, the marital duty, and the interest of the child or children. The same grounds are referred to by the late Sir George Jessel in the case *Re Taylor*, an infant, in 4 Ch. D. at p. 160, and again in the case *Re Elderton*, 25 Ch. D. at p. 222, by Mr. Justice Pearson. The present application is by the father, who has obtained a writ of *habeas corpus*, and the children are before the Court. The strong desire of every Court, of every Judge under such circumstances (in cases of this kind), is to arrive at a conclusion well within the pale of the provisions of the law, that will be just, safe, and proper towards all persons concerned. In *Simpson on Infants*, at p. 133, under the caption or heading—"Father's right to custody enforced in Chancery," it is laid

down that the father may take out a *habeas corpus* in Chancery, or he may obtain an order for the delivery of the infant to him on a petition not in a cause. References are made to *Re Spence*, 2 Phil. 247, and other cases and authorities, and it is there also said that upon a petition the Court can act in a more unfettered way than in *habeas corpus*, and there is, I think, no doubt that it can.

In considering this matter, I freely confess that I have felt and do feel trammelled by reason of the scope of the law applicable to proceedings by *habeas corpus* being less comprehensive than the scope of the law that governs when an application is made to the Court by petition or motion, and I cannot avoid being of the opinion that the rights and interest of all persons concerned in these proceedings cannot be as well and as amply adjudicated upon as if the proceedings had been by petition, instead of by *habeas corpus*. At least there are to my mind grave fears that this will turn out to be so. I think it is so.

In regard to the infant children, I apprehend that the Court has the same jurisdiction, and power, and responsibility, as the former Court of Chancery had; and as the law at present stands, I think there is jurisdiction to direct that for the present proceedings a petition shall be substituted, upon which, as it appears to me, the adjudication can be more comprehensive than in these proceedings by *habeas corpus*.

The Court should, I think, see that before the change that is asked in this case is made, there is the right to have it done, all the provisions of the law of the land being regarded; and in regarding these the rules of equity should, in case of any difference between them and the rules of law, prevail: (O. J. Act, sec. 17, sub-sec. 9.)

Such a direction I think in the interest of the infant children, and really in the interests of all concerned.

It may be said that I offer no opinion as a conclusion in regard to that which I was expected to consider. This is very true; but, having adopted the course that I have, I deem it prudent and proper not to offer, at present, any

opinion that I may have imbibed, or conclusions that I may have drawn in respect to it.

Until I came to consider the matter in respect of which the argument took place, it did not occur to me that so great embarrassment would arise.

I think that there should be a direction that a petition should be presented instead of the present proceedings, and there will be an order to this effect. I will hear what counsel may say respecting costs hitherto, &c.

[After hearing counsel.]

The costs hitherto yet to be disposed of will be reserved to be disposed of with the costs under the petition, if one is presented. If not, application to be made to me as to these costs.

The evidence and examinations taken under the *habeas corpus* proceedings will be used, so far as applicable, and so far as they are evidence, as evidence in the proceedings on the petition, as if taken under the petition.

No objection to be taken on the ground that there is no fund in Court belonging to the infants.

It is understood between counsel that the respondent may put in a formal answer to a petition, and the petitioner may put in a reply if considered necessary.

The order will go according to the above. The present proceedings by *habeas corpus* to be, and considered to be, pending till ten days after petition presented. This to be inserted in the order.

REGINA V. COLLIER.

*Canada Temperance Act—Information—Date of offence—Irregularities—
R. S. C. ch. 178, sec. 87—Warrant of commitment.*

An information for an offence against the Canada Temperance Act charged that it was committed "within the space of three months last past," and did not state that the Act was in force in the place where the defendant was alleged to have committed the offence. No objection to the jurisdiction was taken before the police magistrate who tried the defendant; the defendant appeared, submitted to the jurisdiction, was called as a witness for the prosecution, gave evidence as to the offence alleged against him, and was convicted. The conviction shewed that the Act was in force where the offence was alleged to have been committed.

Held, that it was no objection to the information that it did not state the particular date of the offence, or, under the above circumstances, that the Act was in force in the place where it was alleged to have been committed; in any case these defects in the information were mere irregularities and were cured by R. S. C. ch. 178, sec. 87.

Held, also, that it was no objection to a warrant of commitment in default of distress that it was issued prior to the expiration of a warrant of remand, provided that it was issued after the return of the distress warrant.

Held, lastly, that the commitment of the defendant to the gaoler of the common gaol of the county in which the defendant was convicted was proper.

[December 22, 1887.—*MacMahon, J.*]

AN information was laid before James Noble, Police Magistrate for the county of Middlesex, by David H. Williams, license inspector, on the 20th day of October, 1887, charging that "John Collier did within the space of three months last past," at North Dorchester, in the said county, unlawfully sell intoxicating liquor in contravention of the second part of the Temperance Act.

The defendant was tried for the offence charged in the information before the said Police Magistrate on the 26th of October, and was convicted, and the conviction as drawn up and returned stated that the said John Collier within the space of three months, to wit, between the 21st day of July, last past, and the 20th day of October, 1887, at North Dorchester * * did unlawfully sell intoxicating liquor in contravention of the second clause of the Canada Temperance Act. And he was adjudged for the said offence to pay a fine of \$50, and \$10.50 costs, and

which sums, if not paid forthwith, the same were ordered to be levied by distress, and in default of sufficient distress the defendant was adjudged to be imprisoned in the common gaol of the county of Middlesex for the space of two months, unless the said several sums and all costs and charges of the distress, and of the commitment, and conveying the defendant to gaol should be sooner paid.

A distress warrant was issued on the said 26th of October, requiring a distress to be made forthwith of the goods and chattels of the defendant: and that if no distress could be found, then that the same was to be certified to the said James Noble, the police magistrate.

On the same day, (26th of October,) a remand warrant was issued under the hand and seal of the police magistrate, addressed to the keeper of the common gaol of the county of Middlesex, reciting the conviction of the defendant, and that it was necessary to remand him pending the return of the distress warrant, and commanding the gaoler to keep the defendant in custody in the gaol until the 2nd day of November then next, when the gaoler was commanded to have the defendant at the Police Court at ten o'clock, "before me or before some other Justice or Justices of the Peace for the said county of Middlesex, the said day being the day appointed for the return of the said distress warrant."

On the 27th day of October the constable entrusted with the execution of the distress warrant returned to the police magistrate that he had made diligent search and could not find sufficient goods and chattels of the defendant whereon to levy the sums mentioned in the warrant.

On the 1st day of November the police magistrate issued his warrant of commitment of the defendant for want of distress to the common gaol "for the space of two months from the date of his first delivery to you, the said gaoler, on the previous remand warrant."

On the 25th day of November *Mackenzie*, Q.C., obtained a writ of *habeas corpus*, upon which was indorsed a consent

dispensing with the production of the body of the defendant, signed by his counsel, and on the same day a writ of *certiorari* issued (in aid of the *habeas corpus*), to bring up the information, evidence, conviction, &c.

On the 12th day of December, upon the return of the *habeas corpus* and the writ of *certiorari*, and upon filing same, *Mackenzie* moved in Chambers to quash the information, conviction, and warrant of commitment, and to discharge the defendant from custody, upon the following grounds: 1st. That the information stated no time when the offence with which the defendant was charged was committed; and the information is also bad for not stating that the Act was in force in the place where the defendant is alleged to have committed the offence. 2nd. The warrant of commitment was invalid, having issued on the 1st of November, when the remand warrant did not expire until the 2nd November, on which latter day the gaoler was required to have the defendant before the police magistrate. 3rd. That the warrant of remand was bad, because it ordered the defendant to be confined in the common gaol, the statute not mentioning or authorizing commitment to the common gaol, and the defendant might have been remanded to any other custody.

Delamere, shewed cause.

The cases cited appear in the judgment.

MACMAHON, J.—By. sec. 106 of the Canada Temperance Act it is provided: "Every such prosecution shall be commenced within three months of the alleged offence;" and as the information laid merely charges that the defendant did, "within the space of three months last past," commit the alleged offence, it was urged there was no certain time laid for the commission of the offence.

This question came up for decision in *Regina v. Wallace*, 4 O. R. 127, as to the validity of a conviction under the Canada Temperance Act, in which it was alleged that the offence was committed between the 30th day of June

and the 31st day of July, 1883, and it was held that this was a sufficiently certain statement as to time in a conviction. The law is laid down fully in *Paley on Convictions*, 6th ed., p. 203, where the case of *Regina v. Simpson*, 10 Mod. 248, is referred to, in which the information alleged that the defendant committed the act between the last day of July and the 6th day of August, and within twelve months before the information.

In the last case the prosecution was required to be commenced within twelve months, and the authority goes to the length that if the information had alleged the offence to have been committed within twelve months therefrom, it would have been valid.

In the present case, although it was clearly proved by the evidence in the depositions of the witnesses returned, that the defendant was guilty of the offence charged within three months from the commencement of the prosecution, by laying the information, no particular date could be given by the witnesses as to when the offence had taken place.

I do not think the objection as to the information on the question of time can be sustained.

The other objection to the information, that it does not state that the Act is in force in the place where the defendant is alleged to have committed the offence, is not one which, as far as I can find, has been raised in any of the reported cases.

The summons to the defendant is not before the Court; but there was no question raised, or objection taken to the jurisdiction of the police magistrate before whom the defendant was tried for the offence. The defendant appeared before the police magistrate, submitted to the jurisdiction without objection; was called as a witness on behalf of the prosecution, and gave evidence as to the offence alleged against him, and the conviction shews that the Canada Temperance Act is in force where the defendant is alleged to have committed the offence, so that I do not see that the defendant can raise that objection here under the *certiorari*.

In *Regina v. Ramsay*, 11 O. R. 210, Galt, J., held that if the magistrates had no jurisdiction, appearing before them would not confer it. But as pointed out by Cameron, C. J., in *Regina v. Walker*, 13 O. R. at p. 97, "this does not apply where the Justices have jurisdiction both over the subject of the investigation and the person of the accused, though the process by which the person is brought within the jurisdiction may have been irregular in itself, or irregularly executed."

The above decisions were prior to the passing of the 49 Vic. ch. 49, sec. 2 (embodied in R. S. C. ch. 178, sec. 87), which was enacted for the express purpose of preventing a conviction, order, or warrant made by a Justice of the Peace on being removed by *certiorari*, from being held invalid by reason of any irregularity, informality, or insufficiency, provided that the Court or Judge before which or whom the question is raised is on perusal of the depositions satisfied that an offence of the nature described in the conviction, order, or warrant has been committed over which such Justice has jurisdiction.

Without the authority of *Regina v. Walker*, above quoted, both of the objections taken to the information fail by reason of their being mere irregularities, which by the terms of the above enactment are cured; for it appears by the depositions that an offence of the nature described in the conviction, order, or warrant has been committed, over which the magistrate had jurisdiction.

As to the second objection, that the warrant of commitment having issued before the warrant of remand had expired, and that the commitment was therefore invalid; I have examined the case of *Regina v. Sanderson*, 12 O. R. 178, in which case it was objected that the warrant of commitment was issued before the return of the distress warrant, as it bore date the 14th of June, and the distress warrant was not returned earlier than the 17th June. It appeared, however, that the warrant of commitment was not issued until after the return of the distress warrant, although dated prior to such return. It was held that the

warrant of commitment need not be dated at all if not issued too soon.

In the present case the warrant of commitment was not issued until three days after the return of the distress warrant, although it was issued one day prior to the expiration of the warrant of remand. There can be no valid objection to this, as immediately upon the return of the distress warrant, and there being nothing from which the distress could be satisfied, the magistrate would have been justified in immediately issuing his warrant committing the defendant to gaol under the conviction.

The remand was for the purpose of enabling the distress to be satisfied, in which case the defendant would, upon satisfying the fine and costs, have been released.

The defendant has been in no way prejudiced; the commitment was to date only from the date of the warrant of remand, which was the same as of conviction.

The last objection taken is disposed of by the case of *Lynden v. King*, 6 O. S. 566, where the late Chief Justice Robinson, at p. 568, says: "Where it is said that a commitment must be in writing, that means, as Lord Ellenborough remarks in 7 East 533, a commitment to the sheriff or gaoler." The commitment of the defendant was to the goaler of the common gaol of the county where the defendant was convicted, and was therefore proper.

There was no excess of jurisdiction, and the conviction being regular, the *certiorari* must be superseded.

ROGERS V. WILSON.

Mortgagor and mortgagee—Assignment of mortgage to third person—49 Vic. ch. 20, sec. 7, (O.)—Motion for judgment—Rule 322—Admissions in affidavit on former motion.

The defendant made two mortgages to the plaintiff on the same property. The first mortgage being overdue, the plaintiff brought this action, asking for sale, payment, and possession. After service of the writ of summons, the amount due and costs were tendered by the defendant, and also an assignment of the first mortgage to a third person, for execution by the plaintiff, under 49 Vic. ch. 20, sec. 7, (O.) The plaintiff refused to execute this because of his second mortgage, although he was willing to execute a discharge; and the defendants moved for a *mandamus* to compel him to execute an assignment.

Held, that the plaintiff was justified, notwithstanding the above enactment, in refusing to execute the assignment.

This motion having been dismissed, a statement of claim was filed, and a statement of defence in which the first mortgage was admitted, and the tender and the refusal were set up. The plaintiff then joined issue.

There was no reference in the pleadings to the second mortgage.

On motion for judgment under Rule 322:

Held, that the admissions in the affidavit of the defendant filed on the former motion, could be used upon this motion; and that in view of what was held upon the former motion, there must be judgment for the plaintiff upon the pleadings and affidavit.

Held, also, that a motion under this Rule is properly a Court motion.

[November 23, 1887.—*Rose, J.*]

A. M. Taylor moved for judgment on the pleadings and affidavits of the defendant and his solicitor used on a former motion for a *mandamus*.

C. C. Robinson contra.

ROSE, J.—The claim is by a mortgagee against his mortgagor upon an overdue mortgage for \$1,200, and interest at eight per cent. The plaintiff asks for sale of the mortgaged premises, payment, and immediate possession.

The defence is, that the mortgagor, since writ of summons served, tendered to the mortgagee the debt, interest, and costs, and an assignment of the mortgage to a third party, and refusal by the mortgagee to accept the money and execute the assignment. See sec. 7, 49 Vic. ch. 20, (O.)

On the 4th inst. the defendant moved for a writ of *mandamus** to compel the plaintiff to execute the assign-

*See 7 C. L. T. 399.

ment, and shewed by his affidavit and that of his solicitor, that the mortgagee refused on the ground that he held a subsequent mortgage on the same land for \$400 from the mortgagor, and while he was willing to discharge the mortgage, he was unwilling to assign it to a third party.

On the authority of *Teevan v. Smith*, 20 Ch. D. 724, and *Alderson v. Elgey*, 26 Ch. D. 572, I held his objection well taken, and refused the motion.

The plaintiff has simply joined issue on the statement of defence, but on his motion for judgment has filed the affidavits of the defendant and his solicitor on the original motion.

If I was correct in refusing the mandamus, it is clear the present defence is no bar to the plaintiff's claim on the facts as they are made to appear, and the plaintiff's claim being admitted by the statement of defence, subject to the question of the defendant's right to have the mortgage assigned, it remains to be considered whether on the material before me the plaintiff is entitled to judgment.

Mr. Robinson urged that, as on the pleadings the facts as to the second mortgage did not appear, the affidavits could not be used on the motion, endeavouring to distinguish between an affidavit of the defendant and his examination before the Master.

It is clear that under the old Chancery practice prior to the Judicature Act, on motion for judgment, the examination of the defendant might be read with his answer against him: *Proctor v. Grant*, 9 Gr. 31; *Mathers v. Short*, 14 Gr. 254; *Powell v. Lea*, 20 Gr. 621: the answer being in fact read as an affidavit by the defendant.

I do not think it can be contended that the practice has been narrowed by rules 322, 323, 324, of the Judicature Act; the intention was to broaden it; and I therefore am unable to give effect to Mr. Robinson's objection. I think the pleadings, read with the affidavit of the defendant, shew that there is no defence to the action, and it would be idle to send the parties to a hearing to dispose of an issue which can well be disposed of now.

I also think the motion was properly made in Court.

There may be judgment for the plaintiff for the debt, and for sale of the premises, and for possession. The order for possession should not be enforced until possession is absolutely required.

Judgment accordingly.

FARRAN V. HUNTER.

Jury notice—Action to enforce lien on land—Severing issues.

An action for part of the price of a machine and to enforce a lien on land for such price, with a defence of breach of warranty in the defective condition of the machine, is not distinguishable from an ordinary mortgage action. Such an action would have been in the exclusive jurisdiction of the Court of Chancery before the Judicature Act, and a jury notice is therefore improper under sec. 45, O. J. A.

A separate trial by jury upon the issue raised as to the character of the machine should not be ordered in a case of this kind, where there is but one cause of action.

Temperance Colonization Society v. Evans,¹ 12 P. R. 48; *McMahon v. Lavery*, 12 P. R. 62, distinguished.

[December 1, 1887.—*The Chancery Division.*]

AN appeal by the defendant from an order of Proudfoot, J., in Chambers, of the 3rd October, 1887, came on before a Divisional Court [BOYD, C., PROUDFOOT and FERGUSON, JJ.] on the 1st December, 1887.

The order appealed from was one dismissing an appeal from an order of Mr. Winchester, an Official Referee, sitting for the Master in Chambers, striking out the jury notice filed and served by the defendant.

The action arose out of a contract in writing for the sale by the plaintiff to the defendant of a threshing-machine and horse-power, which contract contained a warranty by the plaintiff. The purchase money, \$565, was secured by two promissory notes; and there was, besides, an agreement indorsed upon it, whereby the defendant gave the plaintiff a lien for the purchase money upon his (the defendant's)

farm. The first promissory note, for half the purchase money, was paid, but default was made in payment of the second. The action was brought not on this second note, but on the contract, claiming payment, and in default seeking to enforce the lien by sale of the farm. The statement of defence was based upon the warranty, alleging as a breach that the machine had turned out to be defective.

The lien was not alluded to in the defence. Replication, by way of avoidance, that the defendant had not given certain notices required by the contract.

The jury notice was struck out because the action was deemed to be one which would, before the O. J. Act have been within the exclusive jurisdiction of the Court of Chancery, and which was therefore to be tried according to the practice of that Court, *i. e.*, without a jury, unless a jury was specially ordered: sec. 45, O. J. Act.

Watson, for the appeal. The garb of the action is not to be looked at, but the substance: *Pawson v. Merchants Bank*, 11 P. R. 72; *Conmee v. Canadian Pacific R.W. Co.*, 12 A. R. 744. There is here but one issue, as to the character of the machine, and that should be determined by a jury. The preliminary question here is the right to recover: the Court will not determine that the plaintiff has a lien until it has determined that something is due. I refer to *Irwin v. Sperry*, 11 P. R. 229; *Temperance Colonization Society v. Evans*, 12 P. R. 48; *McMahon v. Lavery*, 12 P. R. 62; as shewing that the issues may be severed, and the common law issues sent down to be tried by a jury.

T. Langton, contra, was not called upon.

BOYD, C.—In every case where issues have been severed for the purpose of trial, there has been more than one cause of action; here there is only one. This is precisely the same as an ordinary mortgage action, in which relief is asked upon the covenant and also foreclosure or sale. There is really no distinction between the two cases. I see no reason why this action should be split into two.

The facts here make the case quite distinguishable from *Temperance Colonization Society v. Evans*, and *McMahon v. Lavery*. If there is anything in the language used in either of these cases which seems to justify what is sought, it must be read in the light of the circumstances of that case. The defendant could not successfully have demurred to a bill in the Court of Chancery claiming the relief that the plaintiff seeks in this action. It seems to me that is the test. This action is one within the former exclusive jurisdiction of the Court of Chancery, and the order striking out the jury notice was right.

FERGUSON, J.—I take the same view. Every mortgage case in which a defence is raised cannot be split up. I think the order was right.

PROUDFOOT, J., concurred.

Appeal dismissed, with costs.

Watson asked for leave to appeal to the Court of Appeal.

Leave refused.

RE M'RAE AND THE ONTARIO AND QUEBEC RAILWAY COMPANY.

Costs—Taxation—Appeal—Arbitration—Witnesses—Subpœnas—R. S. C. ch. 109, sec. 8, sub-secs. 22, 23—Divisional Court.

The decision of PROUDFOOT, J., 12 P. R. 282, upon appeal from taxation of costs of an arbitration under R. S. C. ch. 109, sec. 8, affirmed.

Quære, whether "the judge" named in sub-sec. 22 could delegate the taxation of costs.

An appeal from the taxation of costs where the amount in question is less than \$40, should not be brought before a Divisional Court.

[December 2, 1887—*The Chancery Division.*]

THE railway company appealed from the order of Proudfoot, J., 12 P. R. 282, to a Divisional Court [BOYD C., PROUDFOOT and FERGUSON, JJ.]

The taxing officer had in the meantime revised his taxation in accordance with the order, and had added \$27.48 to the taxed costs of the land-owner.

Aylesworth, for the land-owner, objected that no appeal lay to a Divisional Court. By R. S. C. ch. 109, sec. 8, sub-sec. 22, the costs are to be taxed by the Judge. The assessment of the Judge as to costs is final; he is *persona designata* by the statute, not the delegate of the Court, or acting as part of the Court; *Re Sheffield Water Works Act*, L. R. 1 Ex. 54. Apart from the question of the right to appeal, the decision of Proudfoot, J., is right. The witnesses came voluntarily in answer to a paper served upon them. No reason can be conceived why the costs of getting the witnesses before the arbitrators should not be allowed. Beyond this the statute is not exhaustive. It says, sec. 8, sub-sec. 23, "such witnesses as may voluntarily appear before them." It does not say that witnesses must not be subpœnaed.

J. M. Clark, for the appeal. The order referring to the taxing officer was made by Ferguson, J. If the contention of the land-owner be correct, Ferguson, J., was "the Judge," *persona designata*, and Proudfoot, J., had no

jurisdiction at all. The latter in entertaining an appeal from the taxing officer acted under the O. J. Act. In his judgment (*ante* p. 283) he refers to Rule 447. If he was acting under that Act, a further appeal lies to this Court. The costs of attendance of witnesses and the subpœna to them should not have been allowed—the latter not even as a notice. The witnesses must be taken to have appeared voluntarily; there can be no costs of procuring their attendance. There is no authority in the Dominion Railway Act for the issue of subpœnas, but there is in the Ontario Railway Act, and that makes the provision of the former Act, sec. 8, sub-sec. 22, the more marked. He referred to *Re Charity Schools*, L. R. 12 Eq. 537.

BOYD, C.—The meaning of the whole matter is quite clear. A land-owner has his land taken from him for a railway, whether he wishes it or not. If he is dissatisfied with the price offered by the railway company, the Act provides for a trial, called an arbitration, as to the true value of the land. In this case he is awarded a larger sum than that which he refused, and he therefore gets his costs. The Dominion Railway Act speaks of the costs of arbitration; it says arbitrators may examine parties and witnesses. "Parties," "witnesses," and "costs" are all well known terms, about the meaning of which there can be no dispute. There can be no doubt that costs of arbitration include the costs of procuring the attendance of witnesses. The Act says the Judge is to tax the costs. As to the power of the Judge to delegate the taxation, I am rather inclined to think he cannot do so, having regard to the decision of the Supreme Court of Canada in *Re The Union Fire Ins. Co.*, not yet reported. But there is no appeal from the order of Ferguson, J., directing the taxing officer to tax, and the parties seem to have agreed that it was proper to refer to the officer. It may be that after taxation the matter should have come back to the same Judge. If that be so, my brother Ferguson is

here now, and concurs in upholding the decision of my brother Proudfoot. The costs of taking reasonable steps to procure the attendance of witnesses should be allowed ; the land-owner had to satisfy the arbitrators ; and, as he succeeded in the arbitration, it should not be at his own expense. The decision is right and should be affirmed with costs. Even if there were not other grounds for dismissing this appeal, I should be inclined to do so on account of the smallness of the amount involved, about \$27. The salutary rule that a case involving less than \$40 or \$50 should not be brought before a higher tribunal than Chambers should not be relaxed.

FERGUSON, J.—If the matter had come before me on appeal from the taxing officer, or if I had taxed the bill myself, I should have done precisely what my brother Proudfoot has done. I fully agree in all the Chancellor has said.

PROUDFOOT, J., concurred.

Appeal dismissed, with costs.

GOWANS V. BARNET.

*Discovery—Examination—49 Vic. ch. 16, sec. 12, (O.)—Solicitor—
“Employee”—“Transfer.”*

The solicitor of a judgment debtor who had absconded, transferred property of the judgment debtor to a purchaser, under power of attorney, and received the consideration money, \$4,000. Upon an application to examine the solicitor under 49 Vic. ch. 16, sec. 12, (O.):

Held, that this provision being remedial and for the purpose of enabling the judgment creditor the better to discover property of his debtor, it should be construed so as to advance the remedy, so far as the fair meaning of the words will permit. The word “transfer” in the expression “any person to whom the debtor has made a transfer of his property or effects” should not be limited to the transfer of the *title* to the property or effects, but should be regarded as equally applicable to the transfer of the *possession*; and therefore the solicitor was a person to whom a transfer of the debtor’s property and effects to the extent of \$4,000 had been made, for the possession of that sum had been transferred to him by the debtor.

Per ARMOUR, C. J.—The solicitor was also an employee of the judgment debtor within the meaning of the section.

[October 24, 1887.—*The Master in Chambers.*]

[November 7, 1887.—*Rose, J.*]

[November 28, 1887.—*The Queen’s Bench Division.*]

AN application by the plaintiff to examine Mr. J. R. Roaf, solicitor for the defendants, under the circumstances set out in the judgment of the Master in Chambers.

The provision on which the plaintiff relied was 49 Vic. ch. 16, sec. 12 (O.), as follows: “Where judgment has been obtained as aforesaid, the Court or a Judge may, on the application of the party entitled to enforce the judgment, order any clerk or employee or former clerk or employee of the judgment debtor, or any person to whom the debtor has made a transfer of his property or effects since the date when the liability or debt which was the subject of the action in which judgment was obtained was incurred, to attend * * and to submit to be examined upon oath as to the estate and effects of the debtor, and as to the property and means he still has of discharging the judgment, and as to the disposal he has made of any property since contracting the debt or incurring the liability, and as to any and what debts are owing to him. The examination.

is to be for the purpose of discovery only, and no order is to be made on the evidence given on such examination."

Walter Macdonald, for the motion.

J. R. Roaf, contra.

THE MASTER IN CHAMBERS.—This is an application for an order for examination of Mr. Roaf, the solicitor of the judgment debtor, under 49 Vic. ch. 16, sec. 12 (O.) The circumstances are peculiar. Mr. Roaf was the solicitor of defendant while he resided in Toronto, and is now his solicitor. The defendant seems to have left the city 28th September last, leaving numerous creditors, among them the plaintiff. On 29th September, the day after he had left, the defendant conveyed to Mr. Oliver, the auctioneer, of this city, all his household furniture and effects, for the alleged consideration of \$4,000. The said goods being, so far as the deponents can discover, all the assets of the defendant in this province.

This bill of sale was executed by Mr. Roaf after the defendant's departure, under a power of attorney from defendant, and it appears that Mr. Roaf negotiated and carried out the sale.

The plaintiff has, of course, a judgment against the debtor, and it must be admitted that the circumstances are pregnant with suspicion as to the intentions of the defendant.

It appears on affidavits before me, and I do not understand it to be denied, that the consideration for the assignment, or the product of the goods conveyed, has been paid by Mr. Oliver to Mr. Roaf, upon delivery of possession by Mr. Roaf to Mr. Oliver, of the goods.

Mr. Roaf, I should say, is quite willing to give any information in his power, which is not against his duty as the solicitor of the defendant.

I do not understand exactly the extent of the privilege which is alleged. Privilege seems to me to refer to confidential communications only, and not to *acts done* by which third parties are affected.

But, assuming a general privilege (which I do not believe exists) to have concealed from creditors the facts and circumstances relating to this large amount of property placed in the solicitor's hands, this case still raises very peculiar questions.

First, I look at the statute, and I think Mr. Roaf is examinable, not because he is a clerk or employee of the defendant, or former clerk or employee, for he is not and never was, any of these things.

I take it, that under the statute he is a person to whom the debtor has made a transfer of his property or effects; for the defendant enabled him to negotiate the sale of, and to give possession of the property to Mr. Oliver, and Mr. Oliver paid him the full consideration. That, I take it, is under the statute a transfer of property and effects, and if it is said that the solicitor received that money as the agent of the defendant, and has to account to him for it, I can only say, that under such other circumstances as are here, that describes one of the strongest cases under the Act, requiring the contemplated examination and inquiry, that it is possible to imagine.

For what is the transfer that the statute is aimed at? A transfer by which the debtor's property is put out of reach of his creditors. It is not necessary that it should be by formal conveyance, or that a beneficial interest should be conferred on the transferee. Transfer is a large word. It is sufficient under the statute in the case of goods, that a possession or right of possession should be transferred. In as bad a case as I can think of, the transferee would be a trustee for the debtor, the transferor. Then what are the facts here? Dominion over the goods is given to the transferee, with power to negotiate the sale of them—to deliver possession of them on such sale, and to receive the money for them, and all this by a man out of the jurisdiction, an absconded debtor. I think that was a "transfer" under the statute by the judgment debtor to the solicitor. That transaction was carried out to the letter. I am not here concerned to inquire on what terms the solicitor,

under the facts, would hold the proceeds of the goods. For what, or how he has disposed of them, is unknown. But this I think there can be no doubt of—that a person having a title to those goods adverse to Barnet's title, could, under the circumstances of this case, have a remedy against the solicitor for a conversion of the goods, because of his taking possession of them however innocently, and selling and delivering them as Barnet's. I refer to the opinion of Lord Blackburn in *Hollins v. Fowler*, L. R. 7 H. L. 766, 768. But before the sale the solicitor was at the very least a bailee in possession, having the right of possession against Barnet, and as such could have maintained trespass for an injury to the goods. See *Pollock on Torts* (English paging, 299 to 302, inclusive). These things seem to make it clear that there was a transfer of the possession and right of possession of the goods in specie, to the solicitor, in fact and in law, which is a transfer under the statute.

The privilege set up is the privilege of the defendant—not of the solicitor. Then the defendant by making this assignment has by his own voluntary act, brought himself within the 49 Vic. ch. 16, sec. 12 (O.); and I cannot imagine why a solicitor should be exempt from such examination. The defendant has waived his right to take such an objection. The defendant is clearly within the Absconding Debtors' Act (I do not mean that an attachment has issued), but if by such transaction as this he can, after he has left the country, transfer his property here, and put it in such a position that it cannot for the time be laid hold of by his creditors, nor even its position be inquired into by examination of the transferee, and all this by a transfer to his solicitor, by which the proceeds may be placed subject to the absconding debtor's own order, it will put this alleged privilege in a new light. But I do not think that is the law. It is not the policy of the Absconding Debtors' Act, nor of 49 Vic. ch. 16, that such a thing should be.

The circumstances here suggest fraud by the defendant sufficiently to enable the plaintiff, independently of any other ground, to procure this examination. It seems that

by receiving this property of the defendant under the circumstances here, the solicitor has placed himself in a position with the defendant, outside of the privilege claimed altogether.

I refer to those cases lately discussed in *Pawson v. Merchants Bank*, 11 P. R. 18; *Regina v. Cox*, 14 Q. B. D. 153, and *Phillips v. Holmer*, 15 W. R. 578. These are cases as to production, and I do not think them precisely in point, but they discuss the effect of fraud in such cases, and I think that is to be inferred here as against the defendant.

Then as to the general law as to privilege in such a case, I refer to *Dwyer v. Collins*, 7 Ex. 639; to *Doe d. Jupp v. Andrews*, Cowper 845; *Taylor on Evidence*, (Blackstone Am. ed.,) p. 805.

An appeal from this decision to a Judge in Chambers, was argued by the same counsel.

ROSE, J.—The facts are fully set forth in the judgment of the learned Master.

I am unable to agree that the solicitor "is a person to whom the debtor has made a transfer of his property or effects." It seems to me he stands more in the position of transferor than transferee. The purchaser from Barnet, to whom the conveyance was made, was the transferee of the goods and chattels, and has been examined by the plaintiff as such. The receipt of the purchase money by the solicitor for his client, or by the solicitor as agent under the power of attorney for his principal, does not, in my opinion, make him a person to whom the debtor has made a transfer of his property or effects.

If it did, then had the conveyance been sent out of the country to Barnet for execution, and been returned to the solicitor, and the money then been paid over to the solicitor, he would, under such circumstances, have been a person to whom the debtor had made a transfer of his property or effects. To this I cannot agree.

I think the appeal must be allowed, with costs to the defendant in any event of the cause.

The plaintiff appealed to the Queen's Bench Divisional Court, before which the appeal was argued on the 25th, November, 1887, by the same counsel.

ARMOUR, C. J.—This provision of the statute is remedial, and for the purpose of enabling the judgment creditor the better to discover property of his debtor, which may be made available for the satisfaction of his judgment. We ought therefore to construe it so as to advance the remedy, so far as the fair meaning of the words used by the legislature will permit. What construction is then to be placed upon the words "clerk or employee," and upon the words "any person to whom the debtor has made a transfer of his property or effects." Was Mr. Roaf an employé? If the words had been "clerk or agent," Mr. Roaf would undoubtedly have been included, for he was certainly an agent. But "employé" has as wide, and indeed a far wider signification than "agent." It signifies, generally, one who is employed. Ambassadors may properly be said to be employed, and agents are very properly and usually said to be employed. Being a word of such general signification, the particular signification to be ascribed to it must be determined by the context, by the circumstances under which, and the purpose for which it is used, and the result of ascribing to it such particular signification.

Used as it is in this provision, and having regard to the context, and the circumstances under which and the purpose for which it is used, it in my opinion clearly includes such an agent as Mr. Roaf was, and the result of ascribing such a signification to it is to further and advance the remedy intended to be given by the provision.

It is said that its signification, as used in this provision, must be controlled and limited by the word "clerk," which precedes it. I do not think so: but the word "clerk" has a

very wide signification, as may be seen by a reference to the criminal law under the head of embezzlement.

As to the construction to be put upon the words, "any person to whom the debtor has made a transfer of his property or effects," having regard to what I have already said, I do not think that the word "transfer" here is to be limited to the transfer of the *title* to the property or effects, but that it is to be held equally applicable to the transfer of the *possession* of the property or effects, and I think the object and reason of the provision and the context clearly shew this to be the case. Mr. Roaf is therefore a person to whom a transfer of the debtor's property and effects, to the extent of \$4,000 has been made, for the possession of that sum has been transferred to him by the debtor.

In my opinion, therefore, the appeal should be allowed, with costs, and the order of the learned Master restored, but the order must be limited according to the very words of the provision.

FALCONBRIDGE, J.—I find myself unable to come to the conclusion that Mr. Roaf is an "employee" within the meaning of this section. The words "clerk or employee" seem to me clearly to indicate a person in the constant and continuous service (for however brief a period of time) of the judgment debtor.

Etymologically considered, the word "employee" no doubt means one who is employed, and may be considered to bear a very wide signification. But I think the word as generally, and I may say universally used, has a much narrower meaning.

The Imperial Dictionary gives the following definition of employee: "The English form of the French employé, one who is employed (especially a clerk), one who works for an employer or master; a clerk, workman, or other person working for salary or wages (but rarely if ever applied to a domestic servant), generally used with the name of the person who employs; as 'the Messrs. Smith gave their employees a holiday.'"

There is no expression in this definition which is consonant with Mr. Roaf's position, and I am, therefore, clearly of opinion that he is not a clerk or employee within the meaning of this section.

It is, perhaps, idle to speculate as to what may have been the intention of a Legislature in a particular case, but I should think that what was meant here was not a person appointed or "employed" to do a particular act or service, but a person working for salary or wages. Apt words could readily have been chosen to indicate any other intention.

Then is the solicitor under the circumstances of this case "a person to whom the debtor has made a transfer of his property or effects since the date," &c.?

I feel pressed by the argument that the policy of the enactment is to advance the right of discovery, and I have come to the conclusion that he is.

In *Doe d. Mitchinson v. Carter*, 8 T. R. 57, a lessee who covenanted not to let, set, assign, transfer, make over, barter, exchange, or otherwise part with the indenture, &c., with a proviso that the landlord might in such case re-enter, gave a warrant of attorney to confess judgment, on which the lease was taken in execution and sold; and that was held to be no forfeiture of the lease.

But in the same case, 8 T. R. 300, it being found by verdict that the tenant gave such warrant of attorney for the express purpose of enabling such creditor to take the lease in execution under the judgment, this is in favour of the covenant, and the landlord, under a clause of re-entry in the lease for breach of the condition, may recover the premises in ejectment from a purchaser under the sheriff's sale.

A similar point was elaborately discussed in *Croft v. Lumley*, 6 H. L. C. 672.

I am of opinion that the control over, or constructive possession of the goods, created here by the giving of a power of attorney, amounts to a transfer of property or effects, within the meaning of the Act, as does also, I think,

the receipt of the purchase money by the appointee or attorney.

I agree, therefore, that the appeal should be allowed with costs, and the order of the learned Master restored.

Appeal allowed, with costs.

REID V. MURPHY.

Interpleader—Sale of goods—Sheriff's charges.

After an interpleader order is made at the instance of a sheriff, the special jurisdiction of the Court under the Act relating to interpleading arises, by which the writ of execution, as such, ceases to operate, and the sheriff in selling the goods seized thereunder acts not for the execution creditor but for the Court under the interpleader order. Where, therefore, a sheriff, under such circumstances, sold goods which were found by the event of an interpleader issue not to have been the goods of the execution debtor, but of the claimant, and paid the proceeds into Court less his charges for possession money and expenses of sale, &c. ; *Held*, that he was not liable to refund to the claimant the amount deducted for such charges.

The claimant's remedy is to recover the amount of such charges from the execution creditor, which he can do in a summary way.

The decision of PROUDFOOT, J., *ante* p. 246, reversed.

[December 21, 1887.—*The Chancery Division.*]

AN appeal by the sheriff of Wentworth from an order of Proudfoot, J., in Chambers, 12 P. R. 246, affirming an order of Mr. Winchester, sitting for the Master in Chambers, requiring the appellant to pay into Court, after the trial of an interpleader issue which resulted in favour of the claimant, the amount deducted by the sheriff for his possession money, &c., from the proceeds of the goods in

question, which were sold under the original interpleader order.

The appeal was argued on the 1st December, 1887, before a Divisional Court composed of Boyd, C., Proudfoot and Ferguson, JJ.

Bicknell, for the appellant, referred to Form 142, O. J. Act; R. S. O. ch. 54, secs. 15, 18; *O'Brien v. Bull*, 9 P. R. 494; *Gray v. Alexander*, 10 P. R. 358; *Goodman v. Blake* 19 Q. B. D. 77; *Attenborough v. St. Katharines Dock Co.*, 3 C. P. D. 450; *Archibald*, Q. B. Prac. 276; *Cababé* on Interpleader, 80-88; *Walker v. Olding*, 1 H. & C. 621; *Woollen v. Wright*, *ib.* 554; *Muclean v. Anthony*, 6 O. R. 330; *Clarke v. Farrell*, 31 C. P. 584; *Reid v. Gowans*, 13 A. R. 501; *Bland v. Delano*, 6 Dowl. P. C. 293; *Dabbs v. Humphries*, 1 Bing. N. C. 412; 3 Dowl. P. C. 377; 1 Hodges 4; *Pitchers v. Edney*, 4 Bing. N. C. 721.

Hoyles (*Beazley* with him), for the claimant, cited the unreported Chambers decisions in *Abel v. Saxton*, *Lucas v. Bulley*, and *Bigham v. Gamble*, and also referred to *Cababé*, p. 87, *Dabbs v. Humphries*, *supra*; and *Smith v. Darlow*, 26 Ch. D. 605.

BOYD, C.—After an interpleader order is made at the instance of the sheriff, the special jurisdiction of the Court under the Act relating to interpleading arises, by which the writ of execution as such ceases to operate, and the sheriff in selling the goods seized thereunder acts not for the execution creditor, but for the Court, under the interpleader order: see *Parsons v. Lloyd*, L. R. 1 Ex. 307, note per Bramwell, B.; *Clarke v. Farrell*, 31 C. P. 584; *Ex p. Ford*, 18 Q. B. D. 369; *Cooper v. Asprey*, 3 B. & S. 932. By the very terms of the order in this case (which is the usual order pursuant to Form 142 of the Judicature Act), the sheriff after selling was to pay the proceeds into Court, after deducting the expenses of sale, and the possession money from the date of the interpleader order. These

represent his actual disbursements in carrying out the directions of the Court as its officer. These he should be allowed to retain, subject to any moderation thereof, if excessive charges are complained of, which is not now the case.

This point was long ago discussed, as we now decide, by Robinson, C.J., in *Gladstone v. McDonell*, 4 U. C. L. J 210, and the same practice is recognized in *McCollum v. Kerr*, 8 *ib.* 71, and other cases in the earlier volumes of practice reports.

The success of the claimant does not justify an order upon the sheriff to refund these expenses retained, because the claimant by not giving security has accepted a sale of the goods as the other alternative imposed by the Court. Such a sale is then to be regarded as for the benefit of all parties, so far as the sheriff is concerned. If the claimant succeeds, his proper remedy is to recover these expenses from the execution creditor, which he can do in a summary way, as that is one of the questions reserved by the order to be ultimately disposed of: *Goodman v. Blake*, 19 Q. B. D. 77. *Armitage v. Foster*, 1 H. & W. 208 (1835,) is suggestive as to both matters of sale and possession money. See also *Underden v. Burgess*, 4 Dowl. P. C. 104. *Dabbs v. Humphries*, 1 Bing. N. C. 412, depends on its own facts, and is distinguished from this because of the sale of the goods having taken place under the execution by consent of all parties. It was therefore not the case, as here, of a sale by and under the express direction of the Court, but one in which the sheriff was acting as agent for the plaintiff.

In *Chitty's Arch. Prac.*, 14th ed., 1375, it is laid down that in general where the sheriff has kept possession, or sold the goods, or done any other act by the order of the Court or a Judge, he will be allowed the costs of so doing. This general practice is efficiently carried out by the forms in the Judicature Act, which enable him to reserve these costs out of the proceeds of sale, and leave the ultimate incidence of these outlays to be dealt with as is just between the litigating parties.

The order should be reversed, and the application against the sheriff dismissed, with all costs of order and appeals to him.

FERGUSON, J.—After a perusal of the cases referred to by counsel, I am of the opinion that the conclusion arrived at by the Chancellor is correct, and that the order appealed from should not stand.

I also agree as to the disposition made by him in respect to costs.

PROUDFOOT, J.—The law must be as my learned brothers say ; but it seems to me that it is a hard and inequitable rule which deprives the claimant of a part of the proceeds of his goods, and leaves him to recover it if he can from the execution creditor.

Appeal allowed.

MCKAY V. BAKER.

Costs, security for—Action by married woman—Nominal plaintiff.

Action to remove a cloud from the title to certain land of the plaintiff, a married woman, whose husband when in embarrassed circumstances had bought the land and taken a conveyance in her name. The plaintiff had no separate estate, and her husband was not a person of substance. There was no trust between the husband and wife.

Held, PROUDFOOT, J., dissenting, that though suing alone and without separate estate, a married woman is not required to give security for costs. The only person who could be plaintiff on the title was the wife, and her husband could not be joined as a necessary or even a proper party. This case did not come within the class of cases where a nominal insolvent plaintiff is put forward, while the substantial litigant keeps in the background in order to avoid liability for costs ; and an order for security for costs was set aside.

[December 21, 1887.—*The Chancery Division.*]

AN appeal by the plaintiff from an order of Proudfoot, J., in Chambers, affirming an order of the local Master at

Hamilton, requiring the plaintiff to give security for the costs of the action.

The action was brought to remove a cloud from the plaintiff's title to certain land. The plaintiff was a married woman. Her husband negotiated the purchase of an interest in the land in question, paid the purchase money, and took the conveyance in the name of his wife, being himself in embarrassed circumstances. The wife was sworn to be able to pay all her debts, but it was not shewn that she had any separate estate or property other than that in question in the action.

The order for security for costs was made on the ground that the action was brought by a merely nominal and insolvent plaintiff for the benefit of another person (her husband).

The facts appear more fully in the judgment of Boyd, C.

The appeal came on to be heard before a Divisional Court, composed of Boyd, C., Proudfoot and Ferguson, JJ., on the 2nd December, 1887.

C. J. Holman and *A. D. Cameron*, for the appeal. The plaintiff is the absolute owner of the land as against her husband. It is not shewn that the third party has any interest at all. Would it be possible to have it declared that the plaintiff is a trustee for her husband? Nor is the plaintiff insolvent: it is not said that she cannot pay her debts. The husband, who, it is alleged, is the beneficial plaintiff, is said to be a person of no substance; if he was added as a plaintiff, the defendant would be no better off. They referred to *Little v. Wright*, 16 Gr. 576; *Mason v. Jeffrey*, 2 Ch. Chamb. R. 15; *Clark v. Rama*, 10 P. R. 384; *Clark v. St. Catharines*, 10 P. R. 205; *Larssen v. Monmouthshire R. W., &c., Co.*, 16 L. T. N. S. 289; *Robertson v. McMaster*, 8 P. R. 14.

Lynch-Staunton, contra, referred to *Re Rainey Lake Lumber Co.*, 11 P. R. 314; *Boice v. O'Loane*, 7 P. R. 359.

BOYD, C.—The husband negotiated the purchase of an interest in the land in question, paid for it, and procured the conveyance of it to be made to his wife, the plaintiff, for the reason that being in financial embarrassment, or being an undischarged insolvent, he could not hold it. The title, such as it is, is in her, and he has no interest therein, except as her husband. The land was bought for the purpose of making a profit out of it, either by selling it or by building on it and renting. The only person who can be plaintiff on this title is the wife—her husband could not be joined as a necessary or even proper party. She does not appear to have any separate estate, but neither does the husband appear to be a person of any substance. The husband acted for her in giving instructions for the action; she knowing that the property was bought for her, and put in her name. Security for costs has been ordered by the Master at Hamilton on the ground that the plaintiff was merely a nominal plaintiff and insolvent.

Though suing alone and without separate estate, a married woman is not required to give security for costs: *Re Isaacs*, 33 W. R. 845. She has the same privilege in this regard as a man who is a pauper. The usual case of nominal plaintiff is, where the substantial litigant keeps in the background because he is a person of wealth, or at all events able to pay the costs. This is not such a case: if husband and wife could be joined as plaintiffs the defendant would not be better off upon a judgment for costs against them.

Bovill, C. J., said in *Sykes v. Sykes*, L. R. 4 C. P. at p. 647: "To entitle a defendant to security, he must shew not only that the plaintiff is insolvent, but also that he is suing as a nominal plaintiff, in the sense of another person being beneficially interested in the result of the action." Montague Smith, J., said: "The cases in which a plaintiff has been compelled to give security on the ground of insolvency, are cases in which the specific debt sought to be recovered has been transferred to a third party, for whose benefit the action is brought. That is founded on

reasons of obvious justice. The real plaintiff ought not to be allowed to enforce his right through the instrumentality of a nominal plaintiff who is not of ability to pay costs if unsuccessful": *ib.* 648. Brett, J., said: "Insolvency alone is not a ground for compelling security. But an exception has been engrafted on that rule, where the plaintiff is merely lending his name for the benefit of another person, and is therefore not the real plaintiff in the action; as, where he has assigned his interest in the debt to another": *ib.* 650. Such is the rule in the latest cases, from which it appears that the Courts will not extend cases in which security is to be given: *Cowell v. Taylor*, 31 Ch. D. 34; *Dartmouth Harbour Commissioners v. Mayor, &c. of Dartmouth*, 34 W. R. 774.

In *Clark v. St. Catharines*, 10 P. R. 205, a ratepayer was one of many interested; he was suing on behalf of the others, and was insolvent; he was put forward by those others, and had but a slight interest as compared with them. This is a very different case from the present, in which the plaintiff is the only person who has any right of action in the premises.

In *Cowell v. Taylor*, Bowen, L.J., says (speaking of the rule that if an insolvent sues as nominal plaintiff for some one else, he must give security), "In that case the nominal plaintiff is a mere shadow." But in this case, if you take away the so-called nominal plaintiff, you take away all the substance there is in the litigation.

There is here no trust between husband and wife; she is in law the only person interested—he has no interest, and could not litigate as a party. There is no authority for extending the law of security to such a state of facts, and in my opinion, the order in appeal and below should be set aside, with all costs to be costs in the cause in any event to the plaintiff.

FERGUSON, J.—The plaintiff's husband in his evidence says that there is no trust between him and the plaintiff in respect to the lands in question. I am of the opinion

that the evidence does not show that there is such a trust, or that the plaintiff herself is not the owner of the interest in the lands. It is not shown, I think, that the plaintiff has been put forward by another person interested to try a right, or that the suit has not been brought at her own instance.

It does not appear, I think, that the plaintiff is suing on behalf of another and is insolvent. According to Baron Bramwell in the case *Larssen v. Monmouthshire R. W. &c. Co.*, 16 L. T. N. S. 289, 290, both these should be shown, to obtain an order for security for costs, and many other authorities are precisely to the same effect. After a perusal of all the cases referred to, I am of the opinion that the order appealed from cannot be sustained, and I concur in the judgment of the Chancellor.

PROUDFOOT, J.—I continue to think that the Master was right in requiring security for costs. The plaintiff is a married woman, in whose name her husband had taken the conveyance of the property in question. No doubt a husband may make a gift of property to his wife which, as between them at all events, would be good; and when he takes a conveyance of property in the name of his wife (I will assume that this is not affected by recent legislation), a presumption of advancement will arise, and the wife would not be a trustee for the husband. And it is also true that parol declarations of the husband subsequent to the conveyance will not be allowed to shew the wife to be a trustee for him.

But in the present instance there is no evidence of a gift. The plaintiff knew nothing of the deed till after it had been executed. And she has no property unless this property should prove to be hers. Then the husband when examined says that the cash paid was all his—none of his wife's; that he took the deed in the name of his wife because, owing to his circumstances, he could not hold it in his own name. That does not shew he intended a gift, he took it in his wife's name, not to give her a benefit, but

because he dared not hold it in his own. It would still then be his. He also says that he bought the land on speculation. What meaning can be attached to that but that he, a land agent whose business was dealing in land, bought it to sell again, which is quite inconsistent with the notion of a gift to the wife.

This same species of evidence that goes to disprove a gift, also tends to rebut a presumption of advancement.

But it is said that these statements of the husband are not binding on the wife. If they were mere parol declarations subsequent to the deed, that, no doubt, would be correct. The Evidence Act, however, R. S. O. ch. 62, sec. 4, enables the defendant to examine the husband in the action, and weight must be given to his evidence as to that of any other witness. The plaintiff had an opportunity of cross-examining him, and did so.

Appeal allowed.

DUNDAS V. DARVILL ET AL.

Interpleader—Liability for costs of execution creditor not contesting claim.

A banking corporation, one of several execution creditors made parties to an interpleader issue, did not desire to contest the right of the claimant to its share of the proceeds of the goods seized and sold, but was willing that such share should be paid over to the claimant, in the event of the latter not succeeding in the issue.

Held, that the corporation was not under these circumstances liable to contribute to the costs of the issue; but, nevertheless, was properly made a party to the issue, and would be entitled, if the claimant failed, to its proportion of the proceeds arising from the sale of the goods.

[December 23, 1887.—*The Common Pleas Division.*]

AN appeal from an order of Rose, J., at Chambers.

The facts appear in the judgment.

Lash, Q. C., for the appeal.

Aylesworth, contra.

MACMAHON, J.—This is an appeal by some of the execution creditors of the defendants' estate from an order made by Rose, J., varying an interpleader order made by Judge Davis, one of the local Judges at London.

The original interpleader order—after barring a number of the execution creditors—directed an issue between the claimants, the Ontario Loan and Debenture Company, and the execution creditors, including amongst the latter the Molsons Bank an execution creditor to the extent of about five-sevenths of the total value of the claims of the execution creditors who by the interpleader order were made parties defendants to the issue.

The issue directed the trial of the question whether the claimants were entitled to be paid out of the moneys realized by the sheriff two certain sums which they claimed as landlords of the execution debtor, David Darvill.

The order gave the carriage of the interpleader proceedings to one of the execution creditors, who was to represent in the issue all the execution creditors who were

directed to proceed to the trial of such issue. The order further directed that such execution creditors as accepted the issue were to contribute *pro ratâ* in proportion to the amount of their executions to the expense of contesting the claim of the claimants.

The Molsons Bank appealed from this order, and asked the same to be varied, so far as it affected the bank, by directing that the amount to which the bank would be entitled out of the moneys in the hands of the sheriff, in case the loan company should not succeed in establishing their claim, should not be the subject of an interpleader issue, there being no dispute about the same; and also that it be directed that the bank should not be bound to contribute to the expense of the interpleader issue.

The learned Judge who heard the appeal, with the consent of the claimants—the bank also desiring and consenting—ordered that whatever portion of the moneys arising from the sale of the goods and chattels seized by the sheriff and mentioned in the interpleader order the bank is, or but for the claim of the loan company would be, entitled to under the provisions of the Creditors' Relief Act, or otherwise, or by virtue of the execution at the suit of the bank against David Darvill & Co. alone, be paid to the claimants, the loan company, to be applied by the company upon the mortgage from David Darvill to them, mentioned in the interpleader order, and the interpleader order made by the local Judge was varied accordingly.

It was further ordered by the learned Judge hearing the appeal, that the bank should not be liable to the claimants, to the sheriff, or to the execution creditors, or to the solicitors of the execution creditors having the carriage of the interpleader proceedings, for the payment of, or to contribute to the payment of, any costs, in so far as the interpleader application and proceedings had reference to the claim of the claimants; and the said interpleader order of the local Judge was thereby varied accordingly; but otherwise such order was not varied, but was ratified and confirmed.

The notice of motion filed on the appeal to the Divisional Court asks for an order setting aside the order of Rose, J., and affirming the order made by the local Judge.

From the notice of motion and the argument on the appeal, there appeared to be a serious misapprehension as to the effect of the order made by my brother Rose varying the order of the local Judge.

Under the order of the local Judge the Molsons Bank was made a party to the interpleader issue, and was thereby entitled, along with the other execution creditors parties to the issue, to all the benefit in respect of the moneys in the sheriff's hands; but was ordered to contribute *pro ratâ*, in proportion to the amount of its execution, to the costs of contesting the claim of the loan company.

By the order varying the order of the local Judge, the bank, as one of the execution creditors, is still retained as a party to the interpleader issue, and entitled to share along with the other execution creditors in the distribution of the moneys, but is relieved from being made a contributory to the costs of contesting the claim of the loan company.

The question for consideration on this appeal, therefore, resolves itself into one of costs as between the bank and the other execution creditors, parties to the interpleader issue.

It was contended by counsel for the appellants that unless the bank accepted an issue, and agreed to contribute to the costs of contesting the claim of the loan company, it should be barred, and that there was no other alternative under the 11th section of the Interpleader Act, R. S. O. ch. 54.

The reply made by the bank to this contention was the same as it made when the matter was before the local Judge, and on appeal before my brother Rose, which was this: As between the loan company and the bank, the bank is willing that the amount to which it is entitled in respect of its execution in the hands of the sheriff, on

the distribution under the Creditors' Relief Act, in case the loan company should not succeed in establishing its claim, should be paid to the loan company.

To the bank it was immaterial what was the result of the interpleader issue! If the loan company succeeded as claimants, the amount received by them in that character was to be applied in reduction of their mortgage against Darvill! And the bank having agreed that whatever was coming to it out of the fund should be paid to the loan company to be applied in reduction of the amount of the same mortgage, it followed that in any event of the interpleader issue the object the bank had in view would be achieved, namely: the reduction of the amount of the loan company's mortgage.*

The bank therefore had no interest whatever in contesting the claim of the loan company; and it would have been most inequitable to compel it to be a contributory to the expense connected with the contestation of such a claim.

The appeal will, therefore, be dismissed, with costs.

GALT, C. J., and ROSE, J., concurred.

Appeal dismissed.

* The loan company's claim as landlords was under the attornment clause in their mortgage, and the bank had, in addition to its execution, a second mortgage on the same property, and was, therefore, interested in reducing the claim of the loan company.

PARKER V. HOWE.

Attachment of debts—Dividends on insolvent estate.

A judgment creditor seeking to garnish funds due to his judgment debtor by S., served an attaching order upon the assignee of S. under an assignment for the benefit of creditors. At the time of the service the assignee had in his hands the greater part of the moneys belonging to the estate of S., but had not declared a dividend; and before he did so, but after the service of the attaching order, the judgment debtor assigned to G. the dividends coming to him from the estate of S.

Held, that the judgment creditor was entitled as against G. to the dividends from the insolvent estate based upon the amount that was in the hands of the assignee when the attaching order was made.

McCraney v. McLeod, 10 P. R. 539, explained and followed.

[December 30, 1887—*The Master in Chambers.*]

AN application to make absolute a garnishing summons.
The facts appear in the judgment.

A. H. Marsh, for the judgment creditor.

Aylesworth, for the assignees of the judgment debtor.

THE MASTER IN CHAMBERS.—This is a garnishment proceeding.

Howe, judgment creditor; Parker, judgment debtor; Palmer, the assignee of one Saunders an insolvent debtor garnishee.

Parker was a creditor of Saunders, and entitled to dividends on Saunders's estate. Howe has a judgment against Parker, and a proof against estate. Palmer, Saunders's assignee—(it was under an assignment for the benefit of creditors made by Saunders)—on the 23rd June, 1887, received for the estate of the insolvent, \$3,062.98. This amount was reduced by preference claims amounting to \$1,032.75, leaving a balance of \$2,030.23, money in the assignee's hands, for distribution among Saunders's creditors.

On the 24th June, 1887, the attaching order of Howe, the judgment creditor, garnishing the debt of Parker against the estate of Saunders was taken out, and was served on Palmer, the assignee, on the 25th June, 1887. No dividend in the estate was declared till September, and

no assets beyond an inconsiderable sum, which I need not notice, have been received since 25th June.

On the 17th August Parker, the judgment debtor, assigned all his interest in the insolvent estate of Saunders to Gault Brothers, and it is between the conflicting claims of Howe, the judgment creditor, and Gault Brothers, the assignee of Parker, to the share of Parker in the estate of Saunders, that I am to decide on this motion.

Upon the above facts, I think that Howe, the judgment creditor, is entitled under the garnishment to the dividends that were payable to Parker from the insolvent estate, based upon the \$2,030.23 in the hands of Palmer, the assignee of that estate, in cash, on the 25th June, 1887, the dividends being \$363.62.

There is a case in 10 P. R. 539, *McCraney v. McLeod*, which seems to be in point. It was in appeal from Chambers before Mr. Justice Rose. The head note of the case is imperfect in not noticing the point which is valuable here. The facts which will all appear in the papers, are familiar to me. McLeod contracted with Hawkins to build a house, for which he was to receive in all \$1,225 : \$300 when the frame was up, \$300 when the building was enclosed, the balance when the work was all completed, which was to be by the 3rd February, 1884. McLeod went on with the work. He received the two sums of \$300 each, but had not completed 3rd February, 1884. He, however, continued the work until the 1st April, when the building being still unfinished, Hawkins entered, took possession, and completed it.

McCraney had a judgment against McLeod, and obtained on it a garnishing order, which was served on Hawkins on the 15th March, 1884.

McLeod had done more work by the 1st of April than was paid for by the \$600 he had received, and it was understood between him and Hawkins that when the latter had completed the house, and had indemnified himself for his outlay and damages, that he should pay the balance of the \$1,225 beyond the \$600, and Hawkins's outlay and

indemnity, to McLeod, and, in effect, the parties did, after the completion of the work, like sensible men, refer the question of amount to the learned Judge of the County Court, who found \$357.32½ payable by Hawkins to McLeod.

After the 1st April, and after Hawkins had taken possession, there were quite a number of garnishing orders served on him for debts due by McLeod, and the question on the case was which, if any, of the attaching creditors, were entitled.

It was held that McCraney was not entitled, because on the 15th March, when his order was issued, nothing was either due or accruing due from Hawkins to McLeod. McLeod had been paid all he was entitled to, and before anything further could come due, the work had been taken out of his hands. But it was held that the subsequent attaching creditors were entitled, in the order of priority of their garnishments, because they had come in after the new arrangement between Hawkins and McLeod, and they were, therefore, entitled to whatever was due from Hawkins to McLeod, as an accruing debt at the time of their garnishments.

I do not know of any case inconsistent with that case, but there are many cases that support it. When it is spoken of as a test of what is garnishable, that an action must be sustainable for it, what is meant is to describe the quality of the claim that is the subject of garnishment, not to insist that there must necessarily be a present right to sustain an action. This is nothing new, for the attaching order binds by its express words all debts owing or accruing from the third person. But they must have accrued before an action, in the common law sense at any rate, can be sustained.

I think that Howe is entitled to the \$363.62.

It is understood that this sum is liable to the lien of Parker's attorney for his costs for the recovery of the claim against Saunders and his estate, to be taxed. This is not in contest at all. I think that Gault Brothers must

pay all the costs of the judgment creditor, Howe, of this motion to pay over. Palmer, the garnishee, must have his costs out of the estate, and the solicitor of Parker must have his costs in the same way. The costs of garnishment of Howe, judgment creditor, other than the costs of the motion to pay over, must be paid by Saunders.

The formal papers are not before me. Gault Brothers and the solicitor must be made parties formally, if not already so.

WELLBANKS V. CONGER.

*Judgment after verdict—"The Court"—Trial Judge—Divisional Court—
High Court of Justice—Rules 315, 321.*

The Court may upon motion enter judgment upon the verdict given at the trial, where the trial Judge has not done so.

Quære, whether such motion should be to the Divisional Court.

"The Court," in Rules 315, 321, means the High Court of Justice : whether as distinguished from its Divisions or not.

Where after a verdict, the Judge presiding at the trial died before giving judgment thereon, it was directed that an order for judgment should be drawn up in the High Court, before the three Judges who composed the Divisional Court of the Common Pleas Division, as Judges of the High Court.

[December 23, 1887.—*The Common Pleas Division.*]

THIS was a motion by the plaintiff for judgment after verdict in an action for libel, tried before the late Mr. Justice O'Connor and a jury at Picton, on the 24th of September, 1887.

The verdict, as endorsed upon the record, was for the plaintiff, and the damages were assessed at twenty cents.

Ritchie, Q. C., for the motion.

W. H. P. Clement, contra.

ROSE, J.—On motion for judgment, as I understood counsel, some question arose as to whether the plaintiff should have a certificate for costs, and the learned Judge

reserved the matter for further consideration, but died before the parties were able to bring it up again before him.

Mr. Clement objected :

1. That the motion was not one to be made to the Divisional Court.

2. That the rules did not provide for such a motion, and therefore the case must be re-tried, as such a motion must be heard and determined before the trial Judge.

3. The right of the plaintiff to costs—if he was entitled to judgment—was not disputed, but the scale of costs, it was contended, depended upon the granting or refusing a certificate.

Mr. Ritchie said that at present he confined his motion to one for judgment with costs, and that if such motion were granted, he would at the time of giving judgment—if so advised—move for a certificate.

The first and second objections may be considered together.

Rule 273 provides that “upon the trial of an action, the Judge may, at or after the trial, direct that judgment be entered for any or either party, or adjourn the case for further consideration.”

Sec. 28, sub-sec. 2 of the Act enacts that “a Judge sitting elsewhere than in a Divisional Court, is to decide all questions coming properly before him, and is not to reserve any case, or any point in a case, for the consideration of a Divisional Court.”

If the learned Judge had lived, it is plain that it would have been his duty to have heard and disposed of the motion.

The English rule 3 of December, 1876, corresponding to rule 273, has the following additional clauses, “or leave any party to move for judgment. No judgment shall be entered after a trial without the order of a Court or Judge.”

There is no rule in express terms providing for such a case as this ; but it certainly would be absurd if the case had to go down to a new trial to obtain what we have

now, namely, the findings of fact upon which to rest a motion for judgment.

Rules 321 and 323, among others, shew it to have been the intention of the framers of the Act not to have judgment delayed through or by reason of any matter of form, where the case is ripe for judgment.

Rule 315 provides that "except where by the Act or by these Rules it is provided that judgment may be obtained in any other manner, the judgment of the Court shall be obtained by motion for judgment," and rule 321 that, "upon a motion for judgment, or for a new trial, the Court may, if satisfied that it has before it all the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought, give judgment accordingly."

Having in view the spirit and intent of the Act, I think these rules provide a practice under which this motion may be made to the Court.

The next question is, whether it may be made to the Divisional Court.

I do not stay to carefully consider this objection, as if "Court" means the High Court, as I am disposed to think it does, then it is clear that we could properly hear the motion sitting as Judges of the High Court; see sec. 28 of the Judicature Act; and so we announced on the argument.

We three Judges who heard the motion had, therefore, clearly jurisdiction to hear the motion, whether it was properly made to us sitting in the Divisional Court or in the High Court, as distinguished from its Divisions; and we must not allow such a technicality to defeat the motion.

The order for judgment may be drawn up in the High Court before the learned Chief Justice, my brother MacMahon, and myself, as Judges thereof, granting judgment for the plaintiff for twenty cents damages, and costs. We say nothing as to the scale, as no motion is pending before us as to it.

GALT, C. J., and MACMAHON, J., concurred.

Judgment accordingly.

CLARRY V. BRITISH AMERICA ASSURANCE COMPANY.

Reference—Sec. 47, O. J. A.—*Actions on fire insurance policies*—
Accounts—*Other issues.*

Where in actions upon fire insurance policies the questions in issue between the parties were not confined to matters of mere account, but the defendants disputed their liability, and issues of fraud, misrepresentation, and concealment of facts were raised upon the pleadings:

Held, that an order referring all the issues in the actions to a referee for inquiry and report was improperly made, and that the plaintiff was entitled to have a trial in the ordinary way.

[December 2, 1887.—*The Chancery Division.*]

AN appeal by the plaintiff, from an order of Rose, J., in Chambers, made under sec. 47, O. J. A., referring all the issues in this action, and five other actions, against different insurance companies, to a referee for inquiry and report.

The actions were brought upon fire insurance policies to recover for the loss by fire of certain woollen mills at Orangeville.

The order of Rose, J., was made upon the application of the defendants, against the contention of the plaintiff, upon the ground that it was necessary to go into long and complicated accounts in order to ascertain the liability of the defendants.

The affidavits filed on behalf of the defendants stated that it was necessary to have an elaborate account taken in order to shew non-compliance with conditions as to proof of loss, fraud, and knowledge of inaccuracies on the part of the insured, and over-valuation.

The defendants disputed their liability, and issues were raised by the pleadings of misrepresentations and fraud in obtaining the issue of the policies, arson, and perjury.

The plaintiff did not admit that there were complicated questions of account involved, and insisted on his right to a trial by jury.

The appeal was argued on the 1st and 2nd of December, 1887, before a Divisional Court, composed of Boyd, C., Proudfoot and Ferguson, JJ.

Laidlaw, Q. C., and *Kappele*, for the appeal, contended that it was not a proper case for reference under sec. 47; referring to *Clow v. Harper*, 3 Ex. D. 198; *Connree v. Canadian Pacific R. W. Co.*, 12 A. R., at pp. 761, 762; *Knight v. Coales*, 19 Q. B. D. 296; *Longman v. East*, 3 C. P. D. 153.

McCarthy, Q. C., and *Wallace Nesbitt*, for the defendants, in support of the order, contended that the Judicature Act abolished the necessity of having two trials, one before a jury or a Judge, and a subsequent one before a referee as to the matters of account; the intention was that all issues should be referred to a referee or arbitrator under sec. 47 or sec. 48, O. J. A.; a Judge here had ordered such a reference, and his discretion should not be interfered with: referring to *MacLennan's* Jud. Act, 2nd ed., pp. 65-69; *Knight v. Coales*, *supra*; *Hoch v. Boor*, 49 L. J. Q. B. D. 665.

Judgment was delivered at the close of the argument.

BOYD, C.—In this case the questions at issue between the parties are not confined to matters of mere account. On the contrary, the defendants dispute their liability, and there are many questions of fraud, misrepresentation, and concealment of facts in issue which it is only right and proper that the plaintiff should have submitted to a jury. We are all agreed that the order of Rose, J., cannot be supported. Section 47, O. J. A., authorizes the reference of any question arising in any cause or matter for inquiry and report, but it does not warrant the reference of the whole of the issues in the cause in a case of this kind. The order must therefore be reversed, with costs in any event to the plaintiff.

PROUDFOOT and FERGUSON, JJ., concurred.

Order reversed.

WATT V. CLARK.

Settlement of action—Powers of solicitor—Instructions from client.

After the trial of an action had been postponed at the assizes and the defendant had left the assize town, his solicitor and counsel effected a settlement with the plaintiff, which was given effect to by the entry of a verdict and judgment by consent. The solicitor admitted that he was not instructed, but relied on his client adopting the settlement, which was in the solicitor's opinion a favourable one. The client said that he had instructed the solicitor not to settle in the way he did.

Held, that the defendant was entitled to have the verdict and judgment set aside and a new trial, on payment of costs.

[December 7, 1887.—*The Chancery Division.*]

MOTION by the defendant to set aside the verdict and judgment entered by Rose, J., at the trial, upon consent of counsel, on the ground that the defendant did not, in fact, consent to the verdict and judgment, and that Mr. Douglas, his solicitor and counsel, had no authority to consent for him.

The action was for libel and slander, and the judgment entered was, that the defendant should withdraw and apologize for the words complained of, and pay \$1 damages and costs. It appeared that at the Assizes during which the consent judgment was pronounced, the trial of the action had at first been postponed; but, after the defendant had left the Assize town, his solicitor and counsel, Mr. Douglas, effected a settlement with counsel for the plaintiff, which was embodied in the consent judgment entered. Mr. Douglas deemed it a favourable settlement for his client, and supposed that he would be satisfied, but he was not expressly authorized, nor, as he said, expressly forbidden to settle. The defendant, however, said that he had instructed his solicitor not to settle, and he refused to abide by the settlement, and now moved to set aside the judgment, and for a new trial.

The motion came before a Divisional Court, composed of Boyd, C., Proudfoot, and Ferguson, JJ., on the 6th December, 1887.

H. J. Scott, Q. C., for the motion. As soon as the postponement was ordered, the authority of the counsel ceased : the authority of the solicitor continued, but his authority is very limited in such a matter. The solicitor and counsel settled a thing that he had no authority to settle at all. When a solicitor is instructed to defend a libel suit, he cannot bind his client to withdraw words and apologize. In *Strauss v. Francis*, L. R. 1 Q. B. 379, and every other case, the opposite party has withdrawn something; see *Archbold's Q. B. Practice*, 14th ed. 102, 103. In all the cases something has actually been done; in this case nothing has been done; when costs are paid the plaintiff will be in as good a position as he was before the settlement.

Aylesworth, for plaintiff, contra. The solicitor may settle except in an unusual manner, and may compromise under an ordinary retainer, unless he is expressly forbidden to do so. I refer to *Archbold*, p. 103; and to *Swinfen v. Swinfen*, 18 C. B. at p. 503; 1 C. B. N. S. 364.

Scott, in reply. This case is quite distinct from any reported case. The defendant should certainly be allowed to have the action tried, if he wants to repudiate a settlement deemed favourable to himself.

Judgment was delivered on the following day.

BOYD, C.—The verdict and judgment must be set aside, and the matter opened up and placed as it was immediately after the postponement, on payment by the defendant of all costs occasioned to the plaintiff by the postponement and motion, and also by the alteration of the paper alluded to in the affidavits.*

The defendant was not actually present when the arrangement was made, and he says he had instructed his solicitor not to settle in that way. The solicitor admits that he was not instructed, but relied on his client adopt-

* It is not necessary for the present report to explain the alteration of this paper.

ing the settlement, which he did not do. This is a free country, and the defendant has the right to do as he pleases. He must be allowed to have the action tried.*

PROUDFOOT and FERGUSON, JJ., concurred.

New trial granted.

CITY OF TORONTO V. TORONTO STREET RAILWAY COMPANY.

Appeal—Injunction—Staying operation of—R. S. O. ch. 38, sec. 27.

Held, that the operation of an injunction awarded by a judgment of the Court below was stayed pending an appeal to this Court, after the perfecting of the security on appeal, by virtue of R. S. O. ch. 38, sec. 27.

[May 11, 1887.—*The Court of Appeal.*]

AT the trial of the action an injunction was awarded the plaintiffs, restraining the defendants from running cars without a conductor as well as a driver.

On the 19th April, 1887, the defendants applied to Boyd, C., who tried the case, for an order staying the enforcing of the injunction, pending the hearing of an appeal to the Court of Appeal. The Chancellor stayed proceedings to the 31st May, but refused any further stay.

On the 11th May, 1887, *McCarthy*, Q. C., on behalf of the defendants, moved to expedite the hearing of the appeal, the security on appeal having been perfected.

Robinson, Q. C., contra.

The cases of *McGarvey v. Strathroy*, 6 O. R. 138, and *McLaren v. Caldwell*, 29 Gr. 438, were referred to.

THE COURT dismissed the application, holding that the enforcing of the injunction was stayed by R. S. O. ch. 38, sec. 27, pending the appeal, and therefore there was no reason for hearing the appeal out of its turn.

* See *Stokes v. Latham*, IV. Times Law Rep. 305.

HARVEY v. McNEIL.

Creditors' Relief Act—Mortgage action—Execution creditors against lands—Ratable distribution of proceeds of sale—Foreclosure judgment.

The Creditors' Relief Act applies to execution creditors against lands in question in a mortgage action for foreclosure or sale, and all such creditors must share ratably in the proceeds of sale, after payment of the mortgage debt, interest, and costs.

Semble, in the case of foreclosure, the old form of decree giving execution creditors as subsequent incumbrancers liberty to redeem according to their priorities, is no longer applicable.

[January, 9, 1888.—*Boyd*, C.]

AN action upon a mortgage for foreclosure, and the usual remedies.

The plaintiff, having an execution against the lands of the mortgagor, which was placed in the sheriff's hands on the 20th March, 1886, redeemed an existing mortgage, took an assignment, and brought this action. George Warnock had also an execution, placed in the sheriff's hands on the 22nd March, 1886. The Master at Guelph, to whom the action was referred, made his report, finding that the plaintiff had priority for the amount of his execution as well as of his mortgage. Warnock now appealed from the report, on the ground that the execution creditors should be on an equal footing.

It appeared that Warnock had paid into Court the usual deposit of \$80, with the object of having a sale instead of a foreclosure, but had been late in doing so, and the Master, when he made his report, had no notice of such payment, but made his report in the manner usual in foreclosure actions.

C. J. Holman, for Warnock. The principle of the Creditors' Relief Act applies, and all execution creditors must share ratably. There should be a sale, and the proceeds, after payment of the mortgage claim, should be distributed ratably: 49 Vic. ch. 16, sec. 37 (O.); *Dawson v. Moffatt*, 11 O. R. 484; *Reid v. Gowans*, 13 A. R. 501.

Middleton, contra. If the Master's ruling is not correct, it is impossible to work out a foreclosure. The Creditors' Relief Act has no application.

BOYD, C.—The Creditors' Relief Act does apply to this case. The old form of foreclosure decree will probably be no longer applicable where there are execution creditors in the character of subsequent incumbrancers entitled to redeem. It may not be possible to fix a sum as the redemption money where all execution creditors are to share ratably. However, in this case there is no difficulty in applying the principles of the Act. Let the judgment of foreclosure be turned into sale; let the land be sold; and declare that, after paying what is due to the mortgagee and interest and costs applicable to his claim, the balance be divided ratably, as by the Creditors' Relief Act, between the execution creditors, who are each to add their costs of this appeal to their claims, and any other execution creditors who may come in before the Master, on his calling for such claims before report on sale.

ARPIN V. GUINANE.

Venue—Preponderance of convenience—Disclosing the names and evidence of witnesses.

The plaintiff lived in Montreal and the defendant in Toronto; the plaintiff had twenty-six witnesses in Montreal, and the defendant twenty-eight in or near Toronto. On a motion to change the venue from Cornwall to Toronto, the Master in Chambers directed the parties to put in affidavits disclosing the names and the nature of the evidence of the witnesses, and upon these determined that the evidence of some of the Montreal witnesses would be irrelevant to the issues, while all the Toronto witnesses might be important, and changed the venue to Toronto. Upon appeal,

Held, that the conclusion of the Master as to the evidence was correct, and his order for change of venue proper upon the affidavits before him; but

Seemle, the direction to disclose the names and evidence of witnesses was improper; not having been appealed against, however, and having been complied with, it could not be disturbed.

[January 10, 1888.—*Boyd*, C.]

AN appeal by the plaintiff from an order of the Master in Chambers, changing the place of trial, on the defendant's application, from Cornwall to Toronto.

The action was for \$293, the price of a bill of shoes sold by the plaintiff, a Montreal wholesale dealer, to the defendant, a Toronto retailer of shoes. The defendant denied the contract, and set up the Statute of Frauds, and also pleaded that the goods were not equal to sample, and that he therefore had declined to receive any after the first lot consigned; and by counter-claim he claimed \$1,000 damages for injury to his business by the sale of inferior goods.

The plaintiff proposed Cornwall, the nearest Assize town to Montreal, as the place of trial.

The defendant swore that he had twenty-seven witnesses in Toronto, and one in Aurora, directly north of Toronto. The plaintiff swore to twenty-six witnesses, all in Montreal.

The Master directed that the plaintiff and defendant should file further affidavits, disclosing the names of their witnesses and the nature of their evidence, in order that he might determine whether or not all were material; and the motion was enlarged for that purpose. On the return

affidavits were filed in pursuance of this direction, and upon them the Master decided that some of the evidence proposed to be adduced for the plaintiff could not be relevant, and he therefore determined that the preponderance of convenience was in favour of Toronto as the place of trial, and he changed the venue accordingly.

The appeal from his order was argued before a Judge in Chambers, on the 9th January, 1888.

Hoyles, for the appeal.

H. T. Kelly, contra.

The following cases were referred to: *Crombie v. Bell*, 3 Ch. Chamb. R. 195; *Lucas v. Taylor*, 4 P. R. 99; *Walton v. Wideman*, 10 P. R. 228; *Cooper v. Central Ontario R. W. Co.*, 4 C. L. T. 83; *Servos v. Servos*, 11 P. R. 135; *Ross v. Canadian Pacific R. W. Co.*, 12 P. R. 220; *Nicholson v. Linton*, 12 P. R. 223.

BOYD, C.—Upon the materials before the Master, I cannot say that his conclusion should be reversed. There is a large number of the persons proposed to be called for the plaintiff whose evidence can not be relevant to the issues. All those proposed to be called by the defendant may be important, though testifying to small matters in the case of some. It is not needful to determine whether an affidavit to disclose the names and evidence to be given was a proper direction, because both parties agreed to that by making the affidavit and not appealing from the direction. As at present advised I should doubt the propriety of adopting it as a test in dealing with the place of trial. It is opposed to *Crombie v. Bell*, 3 Ch. Chamb. R. 195; and there appear to be good reasons for not requiring a discovery of this sort, which could not be obtained in a direct application for discovery of your opponent's case and evidence.

The appeal is dismissed, with costs in any event to the defendant.

LAING V. SLINGERLAND.

Arrest—Capias—Affidavit—"Intent to defeat."

The use in the affidavit upon which an order for the issue of *ca. re.* was granted of the words "intent to defeat," instead of "intent to defraud," the latter being the words prescribed by R. S. O. (1877) ch. 67, sec. 5. *Held*, not fatal to the arrest.

[January 16, 1888.—*Armour*, C. J.]

A motion by the defendant to set aside an order for a writ of *ca. re.*, made by the County Judge of Middlesex, the writ issued pursuant thereto, and subsequent proceedings.

The motion was argued before *Armour*, C. J., in Court on the 14th January, 1888, in whose judgment the ground therefor is stated.

Watson, for the motion.

Aylesworth, contra.

Judgment was given on the 16th January, 1888.

ARMOUR, C. J.—I only retained this case to look into the point whether using the words "with intent to defeat," instead of the words "with intent to defraud,"* in the affidavit upon which the learned Judge granted the order to hold to bail was fatal to the arrest.

I find that it is not; and I refer to *Neven v. Butchart*, 6 U. C. R. 196; *Hargreaves v. Hayes*, 5 E. & B. 272; *McInnes v. Macklin*, 6 U. C. L. J. 14; *Swift v. Jones*, 6 U. C. L. J. 63; *Bamberg v. Solomon*, 2 P. R. 54.

The motion will be dismissed, with costs.

* See R. S. O. (1877) ch. 67, s. 5.

RE GRAHAM V. TOMLINSON.

Prohibition—Division Court—Notice disputing jurisdiction—Ascertainment of amount.

Held, doubting, but following *Re Knight v. Medora*, 14 A. R. 112, and *Re Mead v. Creary*, 31 C. P. 1, that the operation of sec. 14 of the Division Courts Act, 1880, is restricted to cases within the general jurisdiction of the Division Courts, and the absence of a notice under that section disputing the jurisdiction cannot give jurisdiction where the amount claimed is beyond the competence of a Division Court.

But where a cheque was given to the defendant by the plaintiff as a loan of the money represented by it:

Held, that the indorsement of the signature of the defendant on the cheque which was payable to his order, was a sufficient ascertainment of the amount of the plaintiff's claim by the signature of the defendant to satisfy sec. 54 of R. S. O. (1877) ch. 47, as amended by sec. 2 of 43 Vic. ch. 8 (O.), and to give a Division Court jurisdiction where the amount claimed without ascertainment would have been beyond its competence.

Kinsey v. Roche, 8 P. R. 515, overruled; and *Willsie v. Ward*, 8 A. R. 549, and *Forfar v. Climie*, 10 P. R. 90, specially referred to.

Cushman v. Reid, 20 C. P. 147, distinguished.

[May 4, 1887.—*Wilson*, C. J.]

[February 6, 1888.—*The Queen's Bench Division*.]

A MOTION by the defendant for a writ of prohibition directed to the Junior Judge of the county of York, and to the plaintiff, restraining them from giving effect to the judgment delivered on the 11th November, 1886, in the above action in the 6th Division Court of the county of York, on the ground that the Judge exceeded, his jurisdiction in adjudicating in the action, the amount being beyond the jurisdiction of a Division Court.

The action was to recover \$100, money lent by the plaintiff to the defendant, and \$22 interest thereon.

The plaintiff relied upon a cheque for \$100, put in at the trial, signed by the plaintiff, made payable to the order of the defendant and indorsed by the defendant, as an ascertainment of the amount of the original debt by the signature of the defendant.

The motion was argued before Wilson, C. J., in Chambers, on the 9th April, 1887, and judgment was delivered by him on the 4th May, 1887, refusing the prohibition asked for on the grounds: (1) that no notice disputing the jurisdiction was given, as required by section 14 of the

Division Courts Act, 1880 ; and (2) that the cheque put in with the defendant's indorsement, was a sufficient ascertainment of the principal amount to satisfy R. S. O. ch. 47, sec. 54, as amended by 43 Vic. ch. 8, sec. 2, (O.).

There was no question raised as to the \$22 for interest, it being conceded upon the authority of *McCracken v. Creswick*, 8 P. R. 501, and *Re Widmeyer v. McMahon*, 32 C. P. 187, that if the amount of \$100 for principal were ascertained by the signature of the defendant, the Court could not be deprived of jurisdiction by \$22 being super-added for interest.

The defendant appealed from the decision of Wilson, C. J., and the appeal was argued before a Divisional Court composed of Armour, C. J., and Falconbridge, J., on the 29th November, 1887.

Morson, for the appeal.

C. C. Robinson, contra.

Judgment was delivered on the 6th February, 1888.

ARMOUR, C. J.—The Chief Justice in the judgment appealed from receded from the view taken by the Court of Common Pleas, when he was the Chief Justice of that Court, in *Re Mead v. Creary*, 32 C. P. 1, in which that Court affirmed the decision of that case by Cameron, J., in 8 P. R. 374, so far as that learned Judge restricted the operation of the 14th section of the Division Courts Act, 1880, to cases within the general jurisdiction of the Division Court.

This did not seem to me at the time to be the proper construction to be put upon this section, nor to be a construction in accordance with the statutory rule of construction laid down by section 38 of the Interpretation Act, but rather to be a frittering away of the proper effect of a very useful and beneficial provision.

In *Re Knight v. Medora*, 14 A. R. 112, two of the Judges of the Court of Appeal expressly affirmed *Re*

Mead v. Creary, one concurred in the general result of the judgment in the case then in judgment, but whether in the affirmation of *Re Mead v. Creary* does not appear in the report, and the Chief Justice of Ontario expressly declined to give an opinion upon the subject.

I am told, however, that three of the Judges did in fact concur in affirming it, and if this be so, then we are bound by their opinion, which has thus become the judgment of that Court.

The judgment appealed from, therefore, so far as it is in conflict with the judgment of the Court of Appeal in *Re Knight v. Medora*, cannot be maintained, but otherwise I think it unassailable.

The Judge of every Division Court may hold plea of all claims for the recovery of a debt or money demand the amount or balance of which does not exceed two hundred dollars, and the amount or original amount of the claim is ascertained by the signature of the defendant, or of the person whom as executor or administrator the defendant represents; R. S. O. ch. 47, sec. 54; 43 Vic. ch. 8, sec. 2 (O.)

All that is necessary under this section to give the Division Court jurisdiction over all claims for the recovery of a debt or money demand, the amount or balance of which does not exceed two hundred dollars, is, that the amount or original amount of the claim be ascertained by the signature of the defendant, or of the person whom as executor or administrator the defendant represents.

The signature ascertaining the amount or original amount of the claim required by the statute, is not confined by the statute to an instrument upon which the claim is made, or which gives the cause of action; for the claim may be made and the cause of action may arise irrespective of any instrument, but it is quite sufficient if the signature required by the statute is to any writing which may be adduced in evidence, showing the amount or original amount of the claim.

For example, if there had been money transactions between A. and B. without writing, out of which A. became

indebted to B. in \$150, and B. wrote to A. demanding that sum, and A. replied referring to B.'s letter and asking further time for payment, and thereafter B. sued A. for the \$150, the letters so written could be adduced in evidence, and would show that the amount of the claim sued for was ascertained by the signature of A., and would so bring the case within the jurisdiction of the Division Court.

So also, if A. lent B. \$150 and took B.'s receipt for it, and afterwards A. sued B. for the money so lent, the receipt signed by B. would sufficiently ascertain the amount within this section to give the Division Court jurisdiction.

So, in this case, the indorsement of the signature of the defendant on the cheque given by the plaintiff to him payable to his order, the cheque having been given to the defendant by the plaintiff as a loan of the money represented by it, was a sufficient ascertainment of the amount or original amount of the plaintiff's claim by the signature of the defendant to give the Division Court jurisdiction.

For the statute does not require that the debt or money demand shall be ascertained by the signature of the defendant, nor that the claim to recover such debt or money demand shall be so ascertained, but only that the amount or original amount of such claim shall be so ascertained; nor does it require that such amount or original amount shall be so ascertained at the time the transaction takes place which gives the claim, but it is sufficient if such amount or original amount is so ascertained at any time before the entry of the suit for the claim in the Division Court.

This decision will, of course, overrule *Kinsey v. Roche*, 8 P. R. 515; and I refer also to *Wiltsie v. Ward*, 8 A. R. 549, and to *Forfar v. Climie*, 10 P. R. 90, lest it might be said that I had overlooked them.

I think *Cushman v. Reid*, 20 C. P. 147, was well decided, for the amount of the value of the sum mentioned in the note there sued for was a fluctuating and uncertain amount, and had not been ascertained, but the decision in

that case did not at all support the decisions in the other cases referred to.

In my opinion the motion must be dismissed with costs.

FALCONBRIDGE, J., concurred.

Motion dismissed.

FOLEY V. LEE ET AL.

Action—Dismissal for non-prosecution—Motion by two defendants where there are others.

A motion by two of the defendants to dismiss the action as against them for the plaintiff's default in not proceeding to trial was refused, where it appeared that one of the defendants, a necessary party, had for apparently sufficient reasons not been served with the writ of summons, while the action had proceeded against the other defendants, and as against them was ripe for trial.

Semble, that it is the duty of an applicant to apply to the plaintiff's solicitor for information as to the state of the cause in regard to the other defendants, before making such a motion.

[February 6, 1888—*The Master in Chambers.*]

A MOTION by the defendants, the Lees, to dismiss the action as against them for want of prosecution.

The facts appear in the judgment.

J. M. Quinn, for the motion.

G. W. Holmes, contra.

THE MASTER IN CHAMBERS.—This is a motion on the part of two of the defendants, the Lees, to dismiss the plaintiff's suit as to them, because the plaintiff has made default in not proceeding to trial. The defence of the Lees was put in the 6th July last, and if the case were otherwise ready for trial, the plaintiff might have gone down at the last January Assizes for Toronto.

The plaintiff has not succeeded in serving the defendant Tilley with the writ of summons. The reason alleged is, that he left this country and went to England shortly after the issue of the process, and has not yet returned; that the plaintiff could not discover his address in England with certainty; and that it was practically better to await his return from England, as the plaintiff learned that Tilley intended to return, than to endeavour to serve him there; that he is now, as the plaintiff understands, about to return. However, the other defendants having been served and having appeared, the plaintiff, on the 22nd June last, filed his statement of claim against all the defendants, including Tilley, and served it on such as had appeared—that is, all but Tilley. Tilley, however, is felt to be a very necessary party, and the plaintiff has no design to proceed with the case to trial until Tilley can be brought into Court.

I think myself that it is a case that ought to be tried, not dismissed. It is for a declaration of title to land, in which a very serious fraud is charged, and I think, also, that Tilley should be a party in the suit.

Of course, under the old Common Law practice such a course could not have been pursued. A plaintiff who declared before some of the defendants had appeared, would have been held to have abandoned his suit as to the latter. But we have now two rules, 45 and 158, under which such a position as the present, it seems to me, might regularly arise. In fact, under rule 45 a plaintiff might, in pursuing the prescribed practice, be forced, quite irrespective of his wish, into such a position. I refer, of course, here, to the necessity of service of the statement of claim with the process in case of a foreign defendant. And see Rule 158, (c.)

There was one case like this arose some time ago in Chambers—*Menoche v. Menoche*—I know of no other—and that is not reported—in which such a practice as has been pursued in this case was held admissible, and for the same reasons I hold now. It seems it is the duty of a

defendant, one of several defendants, who has defended, and seeks to dismiss for plaintiff not having proceeded to trial, to apply to the plaintiff's solicitor for information, if he has not that information otherwise, as to the state of the cause in regard to the other defendants, before making such a motion. He would in that way learn whether the cause was at issue under rule 176 (see *Ambroise v. Evelyn*, 11 Ch. D. 759), and whether the plaintiff was really in a position to go to trial.

I shall dismiss this, without costs.

REGINA V. GREEN.

Intoxicating liquors—Conviction for selling to an Indian—Variance as to date between evidence and conviction—R. S. C. ch. 43, sec. 87—Findings of magistrate, when reviewable.

A summary conviction by the Police Magistrate of the county of Brant, for selling intoxicating liquor to an Indian in the township of Tuscarora, contrary to R. S. C. ch. 43, stated that the offence was committed on the 29th September, 1887, but the information stated and the evidence disclosed that the offence was committed on the 27th September, 1887.

Held, that the date was not under the circumstances material, there being no suggestion that any wrong or injustice was caused by the mistake, and that sec. 87 of R. S. C. ch. 43, operated to cure this irregularity, as also certain other irregularities complained of, the offence having been clearly proved, the Police Magistrate having express jurisdiction by sec. 96 of the Act, and the punishment imposed being within the power conferred upon him.

Held, also, that where the proceedings before a magistrate are removed under 29 & 30 Vic. ch. 45, sec. 5, the Judge is not to sit as a court of appeal from the findings of the magistrate upon the evidence; if any fact found by the magistrate is disputed, and he would have no jurisdiction had he not found that fact, then the evidence may be looked at to see whether there was anything to support his findings upon it; but if the jurisdiction to try the offence charged does not come in question as a part of the evidence, then the jurisdiction having attached, his finding is not reviewable as a rule except upon an appeal.

[February 10, 1888.—*Street, J.*]

On the 15th October, 1887, information was laid before James Grace, Police Magistrate for the county of Brant, charging that the prisoner did on the 27th of September, 1887, at the township of Tuscarora in the said county of

Brant, unlawfully sell intoxicating liquor to an Indian, contrary to 49 Vic., R. S. C. ch. 43. Upon the prisoner appearing before the police magistrate evidence was given proving the charge as stated in the information, and the defendant was convicted of the offence, and sentenced "to be imprisoned in the county gaol for the space of four months, with hard labor." The conviction, as drawn up, however, stated the offence as having been committed on the 29th of September, 1887. The information, evidence, and conviction having been removed into the Queen's Bench Division by writ of *certiorari*, a writ of *habeas corpus* was issued by order of MacMahon, J., on 7th January, 1888, and the warden of the Central Prison, in which the prisoner was confined, returned the commitment, which followed the conviction in stating the offence for which the prisoner is confined as having been committed on 29th of September, 1887.

Mackenzie, Q.C., upon these proceedings and upon notice moved for the discharge of the prisoner, and urged the following objections to the conviction :

1st. That it should shew whether the offender is a white man or an Indian.

2nd. That the name of the informant should appear in the conviction.

3rd. That it should state in the gaol of what county the prisoner is to be confined, and where that gaol is situate.

4th. That the jurisdiction over offences created by the Act is confined to the special persons mentioned in sec. 8, sub-sec. 3, and sec. 26, sub-sec. 2.

5th. That the police magistrate for the county of Brant has no jurisdiction in the township of Tuscarora, which is an Indian reserve.

6th. It does not appear that the interpreter through whom the evidence was given was sworn.

7th. That the information and evidence state the offence to have been committed on 27th September, while the conviction is of an offence committed on 29th September.

Delamere and Aylesworth, shewed cause.

STREET, J.—The conviction does not shew upon its face whether the prisoner is an Indian or not, but the evidence shews him to be a treaty Indian, and the offence intended is therefore one against the 96th sec. of the Indian Act, 49 Vic., ch. 43 R. S. C.

By sub-sec. 2 of sec. 108 of that Act it is provided that no conviction under sec. 96 “shall be quashed for want of form, or be removed by *certiorari* into any Superior Court; and no warrant of commitment shall be held void by reason of any defect therein, if it is therein alleged that the person has been convicted, and if there is a good and valid conviction to sustain the same.”

The proceedings here seem to be properly before the Court under the authority of the 5th sec. of 29 & 30 Vic. ch. 45 (which is one of the Acts not repealed by the Revised Statutes of Canada), assuming that Act to apply here as I think it does; but I do not understand that even where a Judge under that Act exercises the right to bring before him the depositions and evidence as well as the conviction and other proceedings he is to sit as a court of appeal from the findings of the police magistrate upon the evidence which that officer has taken; if any fact found by the magistrate is disputed, and he would have no jurisdiction had he not found that fact, then the evidence may be looked at to see whether there was anything to support his finding upon it; but if the jurisdiction to try the offence charged does not come in question as a part of the evidence, then the jurisdiction having attached, his finding is not reviewable as a general rule except upon an appeal. See *Paley on Convictions*, 5th ed. p. 401, and cases there cited.

The magistrate in this case, in pursuance of the 53rd sec. of ch. 178 R. S. C., at the conclusion of the hearing made a minute of his finding in the following words: “I find the defendant guilty of the said offence, and adjudge him to be imprisoned in the county gaol, with hard labor.” The only objection here having any weight at all is, that the convic-

tion when formally drawn up erroneously stated the date when the offence was committed as the "29th September," instead of the "27th September," as stated in the information and evidence.

The error here is plainly a clerical error, and I think the date is not under the circumstances material, there being no suggestion that any wrong or injustice had been caused by it.

Under the 28th sec. of ch. 178, 49 Vic., R. S. C. "any variance between the information for any offence or act punishable on summary conviction, and the evidence adduced in support thereof as to the time at which such offence or act is alleged to have been committed *shall not be deemed material*, if it is proved that such information was in fact laid within the time limited by law for laying the same;" so that a variance between the information and the evidence is at all events immaterial; and under sec. 87 of the same Act, no conviction on being removed by *certiorari* shall be held invalid for any irregularity, insufficiency, or informality therein, provided the Court or Judge before which or whom the question is raised is, upon perusal of the depositions, satisfied that an offence of the nature described in the conviction has been committed, over which the justice had jurisdiction, and that the punishment imposed is not in excess of that which might have been lawfully imposed for such offence.

All the objections excepting the 4th and 5th are as to matters which come, I think, within this sec. 87, and as the Police Magistrate for the county of Brant has express jurisdiction under sec. 96 of the Indian Act over the offence here charged, and as Tuscarora, being within that county, is within the limits of his jurisdiction, the 4th and 5th objections cannot be sustained. There is here, then, an offence clearly proved, over which the convicting magistrate had jurisdiction, and he has imposed a punishment within the power conferred upon him; therefore all the objections to the conviction fail, and the motion to discharge the prisoner must be dismissed, with costs.

BECKETT V. GRAND TRUNK RAILWAY COMPANY.

Judgment—Date of entry—Rules (O. J. A.) 326, 327, 527 (b.)

Although by Rule 527 (b.) judgment is not to be signed in cases tried by a jury till the time thereby prescribed, yet, when signed, the entry of it, if the Divisional Court pronounces no different judgment from that of the trial Judge, ought to be dated as of the day on which it was pronounced by the trial Judge.

Rule 326 applies to all cases, whether tried by a Judge, jury, or otherwise, in which the judgment is pronounced by the Court or a Judge in Court, and Rule 327 applies to cases in which the judgment has not been pronounced by the Court or a Judge in Court.

Where the judgment pronounced by the trial Judge upon the verdict of a jury was varied by a Divisional Court:

Held, that judgment should be entered as of the date on which the Divisional Court pronounced judgment.

[January 23, 1888.—*The Master in Chambers.*]

[February 15, 1888.—*Armour, C. J.*]

THIS was an action brought by the plaintiff, as administrator of her deceased husband, to recover damages for his death, under Lord Campbell's Act, and was tried at London, on the 13th November, 1884, and a verdict found by the jury for the plaintiff, and \$3,250 damages; and on the 14th November, 1884, the Chief Justice who tried the cause gave judgment for the plaintiff for that amount, with costs.

It was shewn at the trial that there was an insurance on the life of the deceased for \$2,500, and the learned Chief Justice directed the jury that the amount of this life insurance should be deducted from the amount of damages which otherwise they might find the plaintiff entitled to, and this direction was objected to: and on the 22nd of November, 1884, the plaintiff moved the Queen's Bench Divisional Court, and obtained an order *nisi* to increase the verdict by the amount of this life insurance, on the ground of misdirection.

This order *nisi* stood over for argument at the request of the defendants till Easter Sitzings, 1885, upon the following terms, "stands until next sittings, the defendants

agreeing to leave the question of the insurance policy to be dealt with by the Court," &c. ; and on the 30th of June, 1885, judgment was pronounced by the Divisional Court, increasing the verdict by the amount of the life insurance.

Judgment was not entered until the 22nd of October, 1885, and was then entered as of that date.

On an application afterwards made to the Master in Chambers, he amended the entry of the judgment to make it as of the date when the judgment was pronounced by the Divisional Court—namely, the 30th day of June, 1885, giving the following judgment :

THE MASTER IN CHAMBERS.—The legislation relative to interest on verdicts, I think, has nothing to do with this case. It is intended for cases where the incidents are different from the incidents of this case.

No interest can be allowed on the verdict under sections 266-7-8-9, of the C. L. P. Act, nor, by consequence, under section 4 of the Act of 1884.

I think that this judgment should be amended, and made to take date from 30th June, 1885, when the Court gave the judgment in the action. This is under rule 326, and the interest should run on the judgment from that date.

The plaintiffs offered to amend the judgment to this effect, and I now, therefore, order that the amendment, as I have above expressed, may be made, without costs.

From this judgment of the Master, the defendants appealed to a Judge in Chambers, and the appeal was argued before Armour, C. J., on the 7th February, 1888.

Aylesworth, for the appeal.

Folinsbee, contra.

McLaren v. Canada Central R. W. Co., 10 P. R. 328, and *McEwan v. McLeod*, 10 A. R. 96, were referred to.

Judgment was delivered on the 15th February, 1888.

ARMOUR, C. J.—The decision of the Master in Chambers is right.

The entry of the judgment ought to have been dated as of the day on which judgment was pronounced by the Court.

If the Court had not pronounced a different judgment from the judgment pronounced by the Chief Justice on 14th November, 1884, the entry of the judgment ought to have been dated as of the day on which judgment was pronounced by the Chief Justice, but inasmuch as the Court pronounced a different judgment from the judgment pronounced by the Chief Justice, the entry of the judgment ought to have been dated as of the day on which judgment was pronounced by the Court.

Rule 527 (b.) makes no difference in this respect, for although by that rule judgment is not to be signed in cases tried by a jury till the time thereby prescribed, yet when signed, the entry of it, if the Court pronounces no different judgment, ought to be dated as of the day on which it was pronounced by the Judge before whom the case was tried.

Rule 326 applies to all cases whether tried by a Judge, jury, or otherwise, in which the judgment is pronounced by the Court or a Judge in Court, and Rule 327 applies to cases in which the judgment has not been pronounced by the Court or a Judge in Court.

The appeal must, therefore, be dismissed, with costs.

TEMPERANCE COLONIZATION SOCIETY V. EVANS ET AL.

Jury notice—Money demand—Equitable cause of action—Severing issues—Rule 256, O. J. Act—Trial Judge—C. L. P. Act, sec. 255.

The order of the Chancery Division, 12 P. R. 48, restoring the defendants' jury notice, which had been struck out, was affirmed by the Court of Appeal, 8th March, 1888.

A. H. Marsh, for the appellants.

Hcyles and *A. D. Cameron*, for the respondents, were not called on.

PLATT V. GRAND TRUNK RAILWAY COMPANY.

Appeal—Dismissal for delay—Extending time—Special circumstances—Judge in Chambers, powers and discretion of.

Motion to dismiss the defendants' appeal to this Court for want of prosecution. The judgment appealed from (12 O. R. 119) was pronounced on the 28th April, 1886, and notice of appeal was given within two weeks thereafter. Security was given at the end of June, but the draft appeal case was not sent to the plaintiff's solicitors till the 24th September following, and did not reach them till the 27th September. The period from that date till the 1st of March, 1887, was occupied by correspondence between the solicitors for the parties in an attempt to settle the appeal case, and at the end of that period it became apparent that there must be a motion to a Judge to settle the case. From the 1st of March, however, till the 28th of April, when a year had run from the pronouncing of judgment, nothing was done, and this motion was made on the 14th May, 1887. The reason given for the delay after the 1st March was that the appellants' solicitor thought it best to have the case settled by the Judge who tried the action, and that that Judge did not during the time in question hold Chambers, he being away on circuit. It was shewn, however, on the other side that he was not continuously absent during this period.

Held, by PATTERSON, J. A., in Chambers, that no special circumstances were shown to justify an extension of the time, and that the appeal should be dismissed for want of prosecution.

Held, on appeal, by the Court, that the Judge in Chambers had power to make the order dismissing the appeal, and that nothing was shewn to warrant interference with his discretion.

[May 17, 1887—*Patterson, J. A.*]

[January 10, 1888—*The Court of Appeal.*]

A MOTION by the plaintiff to dismiss the appeal of the defendants from the judgment of Proudfoot, J., 12 O. R. 119, for want of prosecution.

The facts are fully stated in the judgment of Patterson, J. A., before whom, in Chambers, the motion was argued on the 14th of May, 1887.

T. Langton, for the motion.

H. Cassels, contra.

PATTERSON, J. A.—Mr. Langton, for the plaintiff, has moved to dismiss the appeal in this action, for want of prosecution, and Mr. Hamilton Cassels has shewed cause.

The judgment was pronounced on the 28th of April, 1886, and notice of appeal was given within two weeks thereafter. Security was given at the end of June; and immediately after the long vacation the solicitors for the defendants, having some three weeks earlier been written to by the solicitors for the plaintiff for some part of the written evidence, wrote excusing themselves from sending it then, on the ground that they would shortly be submitting the proposed appeal case.

The draft case, however, was not sent until the 24th of September, reaching the plaintiff's solicitors at Goderich on the 27th, when the thirty days fixed by General Order 21 had either quite or almost expired. This delay is not explained. The respondent did not, however, at that time object to the appeal proceeding, and during the next two weeks several letters passed between the solicitors relating to the evidence to appear in the appeal book, ending on the 11th of October by the plaintiff's solicitors referring their part of the matter to their Toronto agents.

The difficulty arose in connection with the use of evidence which had been given in a case of *Platt v. Attrill*, portions of which had been read at the trial from the printed appeal book in that case; and also in connection with other evidence in a case of *Platt v. The Queen*, some part of the evidence given by the plaintiff in that case having apparently been used at the trial as an admission of facts, and the plaintiff's solicitors contending that the whole of the evidence, and not merely the extracts read by the defendants, ought to be before the court.

Correspondence ensued between the defendants' solicitors and the agents, the latter having sometimes to refer to their principals; and this continued as late as February last. On the 8th of that month the agents for the plaintiff's solicitors wrote stating certain things which their

principals insisted on the case containing, and upon that point at all events, though I think also upon others, it was evident that no agreement could be arrived at and that the case must be settled by a judge. A letter was written to the agents on the 12th of February, which left no doubt on that subject; but all hope of avoiding having to go before a judge must, as I should conclude, have been at an end when the letter of the 8th was received. The affidavit filed on this motion, for the defendants, puts it expressly that no such hope remained after the 1st of March, when a letter was received which the agents for the plaintiff's solicitors wrote for the purpose of guarding against possible misapprehension from their not having replied to the letter of the 12th of February.

The year from the pronouncing of the decision did not expire until the 28th of April. There was, therefore, still nearly double the period of thirty days, or more than double if we count from the 8th or 12th of February, before the limitation under R. S. O. ch. 38, secs. 45 or 46, would take effect.

During all that time the appellants did nothing.

The reason given is that it was thought best, by the solicitor who had charge of the appeal, to have the case settled by the judge who tried the action, and that that judge did not, during the time in question, hold Chambers. It is added that he was away on circuit, but no particulars are given of the time he was absent, and I do not understand it to be meant that he was absent all the time from the middle of February, or even from the first of March, the point made being that he had not been sitting in Chambers.

On the other side it is shown that he was not continuously out of town.

Having regard to the nature of the differences respecting the settling of the case, the dispute being mainly, though not altogether, in relation to matters which the respondent thought should be added to the statement of evidence proposed by the appellants, I am not disposed to treat the time between the 24th of September and the 8th of February as having been unreasonably consumed, although it may now seem that the hopes of settling the case without the intervention of a judge were too sanguine. Those four months were, it is true, mostly lost time, but it would not be fair to throw all the responsibility for that on the appellants. Both parties were in good faith trying to

agree, and the respondent did not see fit to take so decided a stand as to insist on a reference to a judge. A minor excuse which is now put forward is, that the plaintiff's solicitors, who had expressed their willingness on the 27th September to send a copy of a missing letter, had never sent it. They explain in an affidavit that they had not the letter; but none of the delay was caused by the want of it.

Another minor excuse is that the reasons against the appeal were not furnished. It is explained that they were ready for months, though not delivered till the 8th of February because the case was not satisfactory—but it is only necessary to read the General Rules 13 *et seq.*, to see that nothing can be made of the absence of those reasons.

The thirty days limited by Order 21 may be in many cases, and no doubt it is, scant enough time to prepare and set down a case; that is, supposing nothing done towards it until after the security is given. Accordingly, there has always been a disposition to look favourably on an application to extend the time where the appellant has been diligent in doing his best to forward the appeal.

But the limitation, which was more stringent under the rules in force before 1878, shews the policy to be to prevent an appeal becoming the means of unreasonably tying up an action, and keeping from the successful party the fruits of his success. The leniency shewn when an application under Order 21 is made within a couple of months after the bond is filed, ought not to be looked for, as a matter of course, ten or twelve months after.

At this date, however, the appellants encounter the statutory limitation of one year from the pronouncing of the decision (R. S. O. ch. 38, secs. 45, 46), which forbids an extension of time except "upon special grounds shewn to the satisfaction of the court or judge granting the same."

When I have had to consider the question of special circumstances on applications under these sections, or for extending time under the Supreme Court Act for appealing I have taken the proper rule to be that the grounds for relief must be such as to satisfy the judge that the delay was caused by special circumstances which would make it unreasonable to impute it to negligence on the part of the appellant, and which would deprive the respondent of reasonable ground for complaining that, by allowing further time, he has, in an arbitrary manner, been deprived of the advantage of his position.

The right given by the statute to the successful litigant is, that he shall not be delayed beyond a year before the appeal is brought to a hearing.

The respondent in this case had done nothing to create an equity, such as spoken of in some of the English cases, entitling the appellants to longer time.

There has been a loss of at least three months of the year, namely, September, March, and April, which I cannot see my way to attribute to circumstances proper to describe as special. I should not feel much difficulty in regarding the September delay as condoned, if it stood by itself; but when after the failure of the long drawn out attempts to settle the case, two months more have been allowed to pass without forwarding the proceedings, the earlier delay can scarcely be overlooked. The explanation of the last delay rests entirely on the fact that the judge who tried the action did not sit in Chambers. I cannot treat that as a special ground within the contemplation of the statute.

If the practice is to settle cases before the judge sitting as the Judge in Chambers for the time, as to which I have no information, it may have been out of the ordinary routine to get this case before the judge who tried it, which the appellants considered of some importance, but no effort was made to do so, and whatever effort was necessary was of course for the appellants to make. If the mountain did not come to Mahomet, Mahomet should have gone to the mountain.

After considering the matter with some anxiety, I cannot see that I could grant the extension except as an indulgence, and that I do not think I am at liberty to do.

I have put my views in writing for the assistance of the parties and the Court, in case the appellants should desire to take the opinion of the full Court.

I grant the order asked for with costs of the application.

Order accordingly.

The defendants appealed from the order to the Court of Appeal, and moved to extend the time for delivering the appeal case, and for leave to enter the appeal for argument, notwithstanding the lapse of more than a year from the judgment appealed from, and the case was argued before HAGARTY, C. J. O., BURTON, PATTERSON, and OSLER, JJ. A., on the 9th November, 1887.

S. H. Blake, Q. C., and *W. Cassels*, Q. C., for the appellants.

J. MacLennan, Q. C., and *T. Langton*, for the respondent.

OSLER, J. A.—The respondent was strictly within his right in moving to dismiss the appeal for want of prosecution, and it was for the appellants to satisfy the learned Judge that the time for bringing it to a hearing ought to be extended. I do not think, looking at all the circumstances of the case, that I should have taken so strict a view as he has done of the alleged delay. On the contrary, I should probably have thought it was not entirely inexcusable, and that it would not have been unreasonable to extend the time on proper terms. But still there was a clear delay of at least two months after the 1st March, 1887, when the correspondence between the parties came to an end, and if the learned Judge thought that this was not sufficiently excused, no effort having been actually made during that time to obtain an appointment from Mr. Justice Proudfoot, or any other Judge, to settle the appeal case, it is impossible for me to say that the exercise of his discretion (for that is what it comes to), was so clearly wrong that it ought to be interfered with.

I have no doubt of the learned Judge's power, sitting as a Judge in Chambers, to make the order in question. It is not an order which involves the decision of the appeal, except in the sense that an order disallowing the security or refusing to extend the time for setting down the appeal is so. It merely precludes the appeal from being brought to a hearing in consequence of some default on the part of the appellants.

I must concur in dismissing this appeal.

HAGARTY, C. J. O., BURTON and PATTERSON, JJ. A., concurred.

Appeal and motion dismissed, with costs.

RE WASHINGTON, A SOLICITOR.

Solicitor and client—Reference to taxation at solicitor's instance—Order for payment—Costs of reference.

A solicitor who has obtained an order for taxation of his bill of costs against his client, and taxed his bill under it, is not entitled to a summary order for payment of the amount found due. Where the client obtains the order for taxation, he thereby submits himself to the summary jurisdiction of the Court, and should be ordered to pay the amount found to be due to the solicitor.

Semble, also, that the order for taxation under Rule 443 should, under the authority of sub-sec. (d.) of that rule, where it is made upon the client's application, contain an order for the payment by him of the amount to be found due upon the reference, but when it is made upon the solicitor's application, should contain no such order. The solicitor should be entitled to add the costs of the reference to his claim only in the event of the client appearing upon the reference.

Millar v. Cline, 12 P. R. 155, distinguished.

In re Harcourt, 32 Sol. J. 92. followed.

[January 20, 1888.—*Street, J.*]

A motion by the solicitor, on notice to the client, for a summary order for payment over to the solicitor of the amount found due by a taxing-officer, and the costs of the taxation, after a reference to taxation, had at the instance of the solicitor, upon which the client did not attend.

The argument was heard on the 17th January, 1888, before *Street, J.*, in Chambers.

H. H. Macrae, for the solicitor.

No one for the client.

Judgment was given on the 20th January, 1888.

STREET, J.—The solicitor has obtained an order for the taxation of his bill of costs against his client under Rule 443, and the bill has been taxed by the officer to whom it was referred at the sum of \$44, which is reduced by a payment previously made by the client, to \$34, and the solicitor's costs of the reference have been taxed at \$22.70. The client did not attend upon the reference, and does not appear to have disputed the solicitor's claim at any time, so far as the materials before me shew.

The solicitor now applies for an order for the payment by the client of the \$34, and the \$22.70 costs of the taxation.

In *Millar v. Cline*, 12 P. R. 155, an order was made by the Chancellor for payment of the bill after a reference to taxation, but in that case an action had been begun by the solicitor, and the bill was referred during the progress of the action; the retainer was not disputed, and nothing remained to be determined in the action, so that the order for payment was in fact a final determination of the matters in question in the action. This case cannot, therefore, be treated as any authority for the proposition that a solicitor, obtaining an order for taxation in the first place, and having taxed his bill under it, may obtain, as a matter of course, an order for payment.

The impression that the practice is in accordance with that proposition seems to have been founded upon an error of long standing, which is pointed out in the very late case of *Re Clarence Harcourt, a Solicitor*, reported in the Solicitor's Journal of 10th December, 1887, vol. 32 at page 92, and commented upon editorially at p. 84 of the same number. It was held in that case by Mr. Justice Stirling that there is a distinction between the order to be made where the application for taxation is by the client, who, by making the application, submits himself to the summary jurisdiction of the Court, and where the application is by the solicitor and there is therefore no such submission on the part of the client. In the former case the order for taxation does, and in the latter case it does not, contain an order for the payment by the client of the amount to be found due to the solicitor.

The distinctions in Rule 443 as to the form of the order to be made, are applicable both to the case of an application by a solicitor and of an application by a client, and they do not specially provide in either case that an order for payment shall be made; but by sub-section (d.) of the order it is provided that the order to be made may con-

tain any variations therefrom, and any other directions which the Court or Judge shall see fit to make.

Under that authority I think the order, where it is made upon the client's application, should contain an order for the payment by him of the amount to be found due upon the reference; but where it is made upon the solicitor's application should contain no such order. In order to prevent the client being charged with the costs of the taxation where he does not dispute the items in the solicitor's bill, or appear upon the taxation, I think the order should follow the form in *Seton*, at p. 605, and provide that the solicitor should be entitled to add the costs of the reference to his claim only in the event of the client appearing upon the reference.

This application for an order for payment of the amount found due by the local registrar, to whom it was referred, is therefore dismissed.

MCINTOSH V. ROGERS.

Vendor and purchaser—Verification of abstract—Mortgage, presumption or proof of payment of—Evidence of registration—Evidence of possession—Election to make perfect title.

1. Upon a sale of land the abstract of title set out a mortgage given to a building society in 1850, the mortgagor being a shareholder by subscription. The proviso was for repayment at the times appointed in the company's rules, by monthly subscriptions, to be continued until the objects of the society should be attained. The mortgage was produced, and had indorsed upon it a memorandum, without date, purporting to be signed by the secretary-treasurer of the society, that it was paid and settled in full, but the signature was not proved. In conveyances made in 1856 and 1874 this mortgage was treated as a subsisting incumbrance.

Held, that this mortgage should not, in favor of the vendor, be presumed to have been satisfied; nor, having regard to the provisions of Chy. G. O. 394 and 396, should the question be disposed of upon a presumption of law. The vendor should shew that some portion of the purchase money did not become payable under the rules of the society within the period of ten years before the contract, or that this could not be ascertained; or that the records of the society could not be referred to; or that there was difficulty in proving the fact set forth in the indorsement on the mortgage, that it had been paid in full.

2. The abstract also set out a registered conveyance from L. G. *et al.* to S. G.

Held, that the purchaser was entitled at the vendor's expense to the production of the conveyance with the usual registrar's certificate of registration of duplicate indorsed upon it, or to the production of a registrar's certified copy.

Re Charles, 4 Ch. Chamb. R. 19, commented upon.

3. If the vendor relies upon a possessory title the purchaser is entitled to cross-examine persons making affidavits in support of it, for the reasons given in *Re Boustead and Warwick*, 12 O. R. at p. 491.
4. It appeared that the vendor, although by the contract he had limited himself to certain proofs, had elected to make out a title perfect both as to abstract and verification, in order that he might compel the purchaser to accept it.

Held, that the purchaser was entitled to have the title made out as strictly and completely as if the vendor had not in any way guarded himself by the terms of the contract.

[January 21, 1888.—*Street, J.*]

THIS was an appeal by the defendant from rulings of the local Master at London upon certain objections made by the solicitor for the defendant to the verification of a solicitor's abstract of title furnished by the vendor, the plaintiff.

The appeal was argued before Street, J., in Chambers, on 17th January, 1888.

G. W. Marsh, for the appeal.

Hoyles, contra.

STREET, J.—The terms of the contract between the parties, together with the judgment of the Chancellor upon the operation and effect of the contract, are to be found reported in 14 O. R. 97.

The plaintiff carried the judgment into the Master's office, and delivered to the defendant a solicitor's abstract shewing a perfect title on its face. The first objection to the verification of it arises with regard to a statement in the abstract admitting that on 24th February, 1850, one William Wright, who then owned the land, mortgaged it to the Middlesex Building Society for £100, and continuing as follows: "Which mortgage was duly paid off and satisfied within the time therein mentioned for payment: the mortgagor, and those claiming under him, have always held possession of the said lands, and have peaceably and quietly occupied and enjoyed the same upwards of thirty-six years, and the said mortgage, in addition to being paid off and satisfied, is barred by the Statute of Limitations, and is not now any charge upon the said lands."

In answer to an objection to this statement in the abstract, the vendor replies as to this mortgage, that it "was fully paid off and satisfied, and being over thirty-seven years old, it is immaterial whether it has been discharged or not. The mortgage is now in the possession of the vendor's solicitor; indorsed on it is a memorandum that it is paid and settled in full, signed by the Secretary-Treasurer of the Building Society, and evidence is produced to shew that no payments have been made on it for upwards of thirty years."

Upon the verification of the abstract the defendant objected. "1. The defendant requires evidence to prove whether or not any money accrued or became due on the mortgage to any person capable of giving a discharge of the same, within the ten years next preceding the date of the contract sued on herein," and if not, then evidence

that no payment had been made or any acknowledgment given, within ten years, by any person liable to pay the mortgage, or by any owner of the land since the making of the mortgage.

The mortgage is produced, and recites that the mortgagor, William Wright, had become the purchaser of two shares in the Middlesex Building Society, the mortgagees, and had agreed to pay £100 therefor: the proviso is, that the mortgage shall be void if the mortgagor, his heirs or assigns, shall, on or before the days and times appointed or to be appointed for that purpose by the rules of the said society, pay to the mortgagees the monthly subscriptions upon the said shares according to such rules: and also all fines, forfeitures, and other payments that may become due in respect thereof, and also interest on the said £100 by equal monthly payments of 10s. each: such several monthly subscriptions and payments of interest to continue till the objects of the said society shall have been attained in manner provided for, or to be hereafter provided for by the rules thereof. Upon this mortgage is indorsed a memorandum without date, and the signature to which was not proved, "the within mortgage is paid and settled in full, James Hamilton, as secretary and treasurer of the Middlesex Building Society."

The plaintiff produced affidavits of the plaintiff, and of the persons who had owned the property during the ten years next before the contract, that they had paid nothing, and had never been asked to pay anything upon this mortgage during the period of their ownership, and that they believed it to have been long since paid and satisfied.

The mortgage is treated as a subsisting incumbrance in a conveyance of the land in question from David Glass to D. W. Hart, dated 3rd May, 1856, which is produced, and which is declared to be made "subject to the payment of the balance upon a certain mortgage from one William Wright to the Middlesex Building Society," and it is also referred to in a conveyance dated 10th October, 1874, also of the land in question, from D. W. Hart to John Guernsey,

as follows: "And the party of the first part hereby covenants and agrees that he will procure the discharge of a certain mortgage made by William Wright to the Middlesex Building Society, bearing date 29th February, 1850, within six months from the date hereof."

No evidence was given as to when the mortgage money became payable under the rules of the society, nor whether the objects of the society had been accomplished, nor was any explanation given as to why the mortgage had not been discharged, nor as to any difficulty in shewing the fact as to payment having been made in full.

I do not think this mortgage should, in favor of the vendor, be presumed to have been satisfied.

None of the cases cited go so far as to shew that such a presumption will be raised in the case of a mortgage which has, up to within a period so recent as thirteen years, been treated as existing. See *Dart on Vendors*, 5th ed. p. 323; *Doe Dunlop v. McNab*, 5 U. C. R. 289, and I think that the question should not be disposed of here upon a presumption of law.

By Chancery Order 394, when the verification of an abstract is being proceeded with, the vendor is with all diligence to afford the purchaser all the means of verification in his power, in the manner and according to the practice usual with conveyancers; and by order 396, in case of the refusal or neglect of the vendor to verify any portion of the abstract to the best of his ability, or to furnish any necessary proof or documents in his power, the Master may authorize the purchaser to do so at the vendor's expense.

The vendor has not attempted to shew here that some portion of the purchase money did not become payable under the rules of the society within the period of ten years before the contract. I think he should have either shewn this, or shewn that this fact could not be ascertained. He has not shewn that the records of the society cannot be referred to, nor any difficulty in proving the fact, if it be a fact, set forth in the indorsement on the mortgage,

that the mortgage has been paid in full. I do not think, therefore, that it has been shewn that he has verified this portion of the abstract to the best of his ability, and I must allow the appeal from the Master's finding upon this objection.

The 9th objection to the verification requires "evidence of the registration of the deed produced from Lydia Guernsey *et al.* to Samuel Glass."

A deed is set out on the abstract from Lydia Guernsey, and a number of other persons, described as heirs of John Guernsey, deceased, to Samuel Glass, and this deed is stated to be registered.

The verification consists in the production of a deed answering the description in the abstract in every particular, but having no certificate of registration indorsed upon it.

A registrar's abstract of title is produced which contains the statement of the registration of a conveyance bearing the same date, and covering the same land as the deed which has been abstracted, but the parties to it are not set forth other than as follows: "Lydia Guernsey *et al.* to Samuel Glass."

I think the defendant is entitled to some further proof of the identity of the registered conveyance with the apparently unregistered one produced; this proof may either be the production of a certified copy of the registered conveyance, or the certificate of the registrar indorsed upon the instrument produced, that the original is registered in his office. I do not think that the purchaser is bound to take the instrument produced, and examine it with the registered instrument, and procure a copy at his own expense. A passage in *Re Charles*, 4 Ch. Chamb. R. 19, has been relied upon as imposing upon purchasers the obligation of themselves verifying statements in abstracts of title as to the contents of documents not produced, but which have been registered at full length under the present Registry laws. That passage is founded upon the quotation from p. 117 of *Coventry* on Conveyancer's Evi-

dence, published in 1832, in which the author contests the accuracy of the statement in the 6th ed. of *Sugden's Vendors and Purchasers*, p. 447, where Lord St. Leonards referring to instruments on record, says of them, "but if a vendor has not the instrument itself, and cannot obtain it, and can make a title without producing the deed itself, he is bound to procure an attested copy of it to enable the purchaser to ascertain that the abstract is correct."

This statement of the law is repeated in the 14th ed. of the same work, published in 1862, and commends itself to me as being a more reasonable view of the duties of a vendor with regard to the verification of an abstract than that he should have the power to tell the purchaser that he must himself proceed to the place where the record is kept, in order to satisfy himself that the statement of it in the abstract is correct. I therefore allow the appeal from the Master's finding upon the 9th objection, and this will dispose of the 10th objection also.

With regard to the 12th and 13th objections, I am not without some doubt as to how they should be dealt with. The plaintiff first sets out a perfect paper title in his abstract, and winds up with an assertion that he has also a good title by virtue of the Statute of Limitations. If he relies upon that title and not upon his paper title, I think the defendant is entitled to stricter and more satisfactory and complete evidence than that contained in the affidavits produced, and should have the deponents produced by the vendor for cross-examination, so that he may have their *vivâ voce* evidence, for the reasons pointed out in *Re Boustead and Warwick*, 12 O. R., at p. 491. But if the plaintiff does not rely upon his possession, excepting as shewing that it has always gone with the paper title, I think the affidavits should be treated as sufficient for the purpose. In order that this question may be considered in this view by the learned Master, I allow the appeal upon these two objections.

I gather from the written notes of the findings of the learned Master upon the various objections, that he has

dealt with the matter as if the plaintiff, in making out his title, were holding himself entitled to confine his proofs to the limits prescribed in the contract, and that the purchaser could not require him to furnish any excepting the proofs stipulated for. But the plaintiff appears to have elected to make out a title perfect both as to abstract and verification, in order that he might compel the purchaser to accept it, which he could not otherwise do. I think, therefore, that the purchaser is entitled to require to have the title made out as strictly and completely as if the vendor had not in any way guarded himself in the contract.

The result upon the whole is, that the appeal is allowed as to the disallowance of the 1st, 9th, 10th, 12th, and 13th objections, and is dismissed as to the others. No costs of appeal to either party.

BROWN v. PEARS.

Discovery—Action for specific performance—Examination of grantors of vendor before defence—Objections to title—Condition in contract—Time.

In an action by a vendor for specific performance of a contract for sale of land, at the price of \$24,000, it appeared that less than three weeks before the contract the vendor had obtained a conveyance of the land from his two sisters, in which the consideration expressed was \$5,000. The sisters were old and infirm, and being unmarried lived, and had for a great many years lived, with the plaintiff, and were said to be under his influence. The defendant was advised that so great a difference in the price required explanation, and had made endeavors to see the sisters, but had been refused access to them, and the plaintiff had refused to procure them to join in the conveyance to the defendant.

Held, that under these circumstances the defendant should be allowed, under Rule 285, to examine the two sisters before delivering his defence.

It was contended on behalf of the plaintiff that the title could not now be objected to by the defendant, as by the terms of the contract all objections to the title were to be notified by the 26th December, 1887, and this was not taken until a week later.

Held, following *Ward v. Stallibrass*, L. R. 8 Ex. 175, that such a condition did not apply to the case of the vendor being unable to give a good title, but only to objections and requisitions which might have been properly enforced against a vendor who had a valid title; and the objection here might go to the root of the plaintiff's title.

[February 1, 1888.—*The Master in Chambers.*]

MOTION by the defendant for an order to examine two witnesses for discovery before statement of defence, under Rule 285.

The facts appear in the judgment.

Allan Cassels, for the motion.

Watson, contra.

THE MASTER IN CHAMBERS.—This is an application to examine for discovery, under Rule 285, two ladies, not parties to this suit, the sisters of the plaintiff.

The action is for the specific performance of a contract of purchase of land in this city, which the defendant agreed to buy from the plaintiff.

The agreed price is \$24,000. Upon investigation of the title on the part of the defendant, it was discovered that the plaintiff had received a conveyance of the land from his sisters, living with him, less than three weeks before

the agreement with the defendant, for the alleged consideration of \$5,000.

The defendant's affidavit states that the plaintiff is accustomed to business, and that the ladies, his sisters, are old and infirm, are unmarried, and live, and for a great many years past have lived, with the plaintiff, who for all that time has managed, as defendant believes, all their business affairs, and has a great influence over them. That one of the ladies, as defendant is informed, has been for some months past an invalid, and is confined generally to her bed; and that the other lady has been confined to the house for some months past, owing to bad health.

That the defendant has been advised by his solicitors, that so great a difference of price as that which the plaintiff is receiving under the contract with the defendant, and that which he apparently paid to his sisters less than three weeks before, required explanation; and that his solicitor had accordingly endeavoured to see the ladies on the subject, but that admission to them had always been refused. That he, the defendant, and the agent who acted for him in the negotiation of the agreement, had also gone to the house of the plaintiff to see the ladies for the same purpose, and that the plaintiff had refused to admit them. That a registered letter sent by the defendant's solicitors to the ladies for information had been received by the plaintiff from the post-office delivery. That he the defendant desires to carry out the sale, and does not at all seek delay. That he is advised by his solicitors that it is necessary, for the purpose of putting in his defence, that he should, under the circumstances, first have an examination of these ladies in the suit.

There is an affidavit from the defendant's agent, who acted for defendant in the negotiation of the agreement, confirming the defendant's affidavit, and stating that he had repeatedly asked the plaintiff that he might be allowed to see the ladies for an explanation and information, which the plaintiff had always refused to allow.

There is also a letter put in from the defendant's solicitors, sent on 3rd January last to the plaintiff, suggesting that they thought it proper that some way should be adopted of obtaining and shewing the ladies' acquiescence in the transaction of the plaintiff with the defendant. The letter does further suggest, as a satisfactory way, that the ladies should join in the deed from the plaintiff to defendant. This was met, I understand, as the other proposals had been, by simply declining, except that the plaintiff declares his willingness to release the defendant from the contract, should the defendant desire it.

I can only say that I think that this application is made in good faith, and that it is highly proper, under the circumstances, to grant it. I think the defendant should take means to enable himself at this stage to set up his real case; and it seems he can only do it by procuring the order he now seeks.

When it is considered what the defendant does *now* know, and the course this matter has taken—that the plaintiff has refused the defendant access to these ladies for any explanations of these matters, and has declined the proposal that they should join him in the conveyance to the defendant, any one must see that the defendant might stand in a bad position hereafter, in an action at the suit of these ladies, or those claiming under them, if knowing what he does, he did not take any means open to him to test their acquiescence in his transaction with the plaintiff, or rather their acquiescence in the plaintiff's purchase from them, after their full knowledge of the terms between the plaintiff and defendant.

The facts above set forth are not denied by the plaintiff in any affidavit. The only objection urged, except a general resistance to the motion, is, that by the contract all objections to title were to be notified by the 26th December last, and this was not taken until a week later. But in *Ward v. Stallibrass*, L. R. 8 Ex. 175, it was held that such a condition did not apply to the case of the vendor being unable to give a good title, but only to objections

and requisitions which might have been properly enforced against a vendor who had a valid title. The effect of this examination may go to the very root of the plaintiff's title, for all I can tell.

I make the order for the examination for discovery ; costs in the cause.

EMERSON V. GEARIN.

Counter-claim—Costs—Construction of order.

Although for some purposes a claim and counter-claim form but one action, yet the costs of the counter-claim are to be taxed separately from the costs of the action, a counter-claim being for the purposes of taxation to be treated as a cross-action.

McGowan v. Middleton, 11 Q. B. D. 464. and *Beddall v. Maitland*, 17 Ch. D. 174, followed.

And where the order of a Divisional Court varied the judgment at the trial by directing that the counter-claim should be struck out and not dismissed, and should be disposed of in a separate action, and also directed that the defendants should pay into Court the amount of the costs of the action, but was silent as to the costs of the counter-claim : *Held*, that the rights of the parties must be governed by this order, and not by anything that preceded it, and that under it the plaintiffs were not entitled to tax the costs of the counter-claim.

[February 4, 1888.—*Street, J.*]

AN appeal, by the defendants, from the taxation by a local officer at St. Catharines of the plaintiff's costs of a counter-claim was argued before Street, J., in Chambers, on the 3rd February, 1888.

H. H. Collier, for the appeal.

McClive, contra.

The following judgment, in which the facts are set out, was delivered on the following day.

STREET, J.—The defendants filed a counter-claim in this action, and the claim and counter-claim came on for trial together. A judgment was given in favor of the plaintiffs

for their claim, and the counter-claim was ordered to be dismissed. The defendants moved against this judgment, and an order was made at the last Michaelmas sittings of the Common Pleas Division, which is evidently a consent order. This directs "that the judgment ordered to be entered in this action at the trial thereof be varied to this extent, viz., that the counter-claim of the defendants, as set up by them in this action, *be not dismissed*, but be, and the same is hereby altogether struck out of this action." And it is further ordered "that within ten days after the plaintiffs shall have taxed their costs of *this action* (other than the costs of this motion) the defendants do pay into Court to the credit of this cause, to abide further order herein, the amount of such costs, together with the sum of \$278.12, the amount of the plaintiffs' claim in this action." The counter-claim is directed to be disposed of in a separate action.

The plaintiffs proceeded under this order to tax their costs before the taxing-officer at St. Catharines, and he has certified that he has allowed to the plaintiffs, as part of their costs, the costs of, and in connection with, the defendants' counter-claim. He seems to have considered himself entitled to go behind the order and to look at the findings upon the counter-claim indorsed upon the record, in order to ascertain the plaintiffs' right to these costs.

The defendants appeal from this ruling, and I am of opinion that the appeal should be allowed. The order is by consent, and varies the original judgment, and the rights of the parties must be governed by the order, and not by anything which preceded it. By the order the counter-claim and the action are treated as distinct, and are dealt with separately, the counter-claim being struck out of the proceedings without any direction as to costs. The only ground upon which the plaintiffs could succeed in their contention as to the costs of the counter-claim would be that they are comprised in the costs of the action. But, although it has been held that for some purposes a claim and a counter-claim form but one action, yet

the costs of the counter-claim are to be taxed separately from the costs of the action, a counter-claim being for the purposes of taxation, as well as for some other purposes, to be treated as a cross-action : see *McGowan v. Middleton*, 11 Q. B. D. 464 ; *Beddall v. Maitland*, 17 Ch. D. 174.

I can find nothing in the language of this order entitling the plaintiffs to tax the costs of the counter-claim, and much to lead to a contrary conclusion. The appeal should therefore be allowed, with costs.

HARTNETT V. CANADA MUTUAL AID ASSOCIATION.

Discovery—Examination of local agent of life insurance company.

In an action upon a life insurance policy an order was made, at the instance of the plaintiff, for the examination for discovery only of the local agent of the insurance company who procured the application for insurance.

[February 6, 1888.—*Robertson, J.*]

AN appeal by the plaintiff from an order of the Master in Chambers refusing an application by the appellant for leave to examine one Trull, a local agent of the defendants for discovery, after the close of the pleadings.

The facts appear in the judgment of Robertson, J., before whom the appeal was argued in Chambers.

O'Sullivan, for the appeal.

Masten, contra.

ROBERTSON, J.—Action on a life assurance policy on the life of Mary Hartnett, the wife of the plaintiff. The local agent, at Oshawa, of defendants received the application, which was accepted by the defendants, and the policy in question issued thereupon.

Defence admits that they issued the policy (or certificate of membership, as it is called) whereby if the same had

been valid and all the conditions attached thereto had been complied with, the life of the said Mary Hartnett would have been insured, &c., and that said certificate was issued after and in reliance upon the declaration in the application stated of the said Mary Hartnett, whereby she warranted that her answers as written to the questions were full, complete, correct, and true, and agreed that the same should form part of the contract, &c. That in answer to question No. 4, she said she was born on 9th April, 1831; and to No. 5, she would at her next birthday be fifty-five years old; and to another question as to her age the answer is fifty-four years; and that these answers were untrue, &c., and by reason thereof the said certificate is wholly void, &c.; and defendants allege that the said Mary Hartnett was in fact and in truth at the time she made the said application over sixty years of age, &c.; and she untruly stated her age to be fifty-four years for the purpose of inducing the defendants to grant her the said certificate, which they would not have done if her true age had been stated, &c.; and that by the by-laws of the association, by which in her said application she agreed to be bound, no certificate should ever be granted by defendants to anyone who was over the age of sixty years.

There is also a counter-claim to recover back \$200 which was paid to plaintiff after the death of Mary Hartnett, on the supposition that the certificate was valid, &c.

In reply the plaintiff sets forth that the said Mary Hartnett, when she applied to the agent of defendants for a certificate of membership, informed him that she did not know her age, but that it was between fifty and sixty years, and the defendants' agent placed it at fifty-four years, and plaintiff does not know whether that is correct or not; subsequently the defendants were informed by other persons that the said Mary Hartnett was apparently older than stated by their agent, and after her death the same fact was reported by the medical officer; but, notwithstanding this and other information, defendants voluntarily adopted the certificate, and with full knowledge as to the incorrectness of the age,

assessed other members for the payment of this claim and paid the plaintiff the \$200 mentioned in counter-claim, and they claim that defendants waived any incorrectness there may be as to age, &c. After the pleadings were closed, a clerk in the plaintiff's solicitor's office makes an affidavit that he believes the plaintiff would derive material benefit from the examination of one Henry Trull, through whom was made the application of the deceased Mary Hartnett. He does not state that Trull is the agent of the defendants, and if the defendants had opposed the motion on that ground I could understand that plaintiff would not have been successful, but the defendants file the affidavit of their manager, Mr. W. Pemberton Page, in which he says he is the secretary of the defendants, and that "the said Henry Trull acted at the time of the said application as a local agent of the defendants in soliciting and procuring applications from persons desirous of insuring their lives in the defendants' association, &c. So that there is no doubt that Henry Trull is the agent, or at the time of the application was the agent of the defendants. Now this application is made for the examination of Mr. Trull by way of discovery only. What he swears to cannot be received in evidence against the defendants at the trial, unless the Court or Judge making the order so directs, and unless this direction is made such examination cannot be received. It has so been held in this Division of the High Court, and I have on many occasions refused to receive such depositions or examinations as evidence at the trial, unless so directed, or the person examined is a party to the action. It appears to me that this is a case where it is necessary for the purposes of justice that the order should be made for the examination of Mr. Trull for the purposes of discovery. It can do the defendants no harm, and it is really important that the plaintiff should know what did take place between the deceased and the defendants' local agent on the occasion of his receiving her application.

With the greatest respect for the opinion of the learned Master, I feel unable to come to the same conclusion which

he did when he refused the order, and I must allow the appeal, but I will make no order as to costs, inasmuch as I think the material moved upon was not all that it should have been. The order must not direct that the examination of this person is to be received in evidence against the defendants at the trial; it is for discovery only, and if defendants wish, the order may direct that the examination shall not be so received, &c.

REGINA EX REL. CHAUNCEY V. BILLINGS.

Municipal elections—Quo warranto—Defective material—Statement—Recognizance—Affidavit—Amendment.

Upon an application for a *fiat* for the issue of a summons in the nature of a *quo warranto* under the Municipal Act of 1883, to try the validity of the respondent's election as a municipal councillor, the statement of the relator did not shew that he was a candidate or an elector who voted or who tendered his vote at the election, as required by sec. 185 of the Act; and the recognizance filed by the relator was not entered into before a Judge or commissioner for taking affidavits, nor allowed by the Judge, in the manner prescribed by sec. 186, nor was it conditioned to prosecute the writ with effect; and the affidavit of the relator in support of the application did not set out fully and in detail the facts and circumstances alleged in the statement, as required by rule 2 of the Rules of Michaelmas Term, 14 Vic.

Held, that these were defects in the material necessary to found the application, not mere irregularities which could be amended at a later stage, and the *fiat*, the writ, and all proceedings were set aside, with costs.

[February 9, 1888.—*MacMahon, J.*]

THE relator obtained a *fiat* under the Municipal Act, 1883, for the issue of a summons in the nature of a *quo warranto* to contest the validity of the election of the respondent as a councillor of the village of Markham, issued the summons pursuant thereto, and served it upon the respondent, who now moved to set aside the *fiat*, the summons, and all other proceedings, upon grounds set forth in the judgment of MacMahon, J., before whom, in Chambers, the motion was argued.

W. H. P. Clement, for the motion.

R. Boulton, contra.

MACMAHON, J.—This is a motion on behalf of the respondent, Billings, for an order to set aside the *fiat* for the issue of the writ of summons, the writ, and all subsequent proceedings founded thereon, on the grounds:

1. That it was not shewn upon the application for the *fiat* that the relator was a candidate at the election, or an elector who gave or tendered his vote thereat.

2. That upon the said application it was not shewn that the relator had entered, nor did he upon such application enter, into a recognizance with two sureties, as required by the statute, in that (*a.*) the recognizance filed therein was not taken before the Judge by whom the said *fiat* was granted, or before a commissioner for taking affidavits; (*b.*) the said recognizance is conditioned to prosecute a certain writ of summons to be issued against the said Charles Billings, to shew by what authority he claims to be Reeve of the village of Markham, and not to prosecute the writ of summons issued herein.

[Upon two other grounds not considered.]

5. That upon the application for said *fiat*, no affidavit or affidavits of the relator or other person or persons setting forth fuller and in detail the facts and circumstances upon which the said motion was based, was filed, as required by the Rules of Court in that behalf.

As to the first ground taken, 46 Vic. ch. 18, sec. 185, (O.), provides: "In case * * the validity of the election or appointment of mayor, warden, or reeve, or deputy reeve, alderman, or councillor is contested * * and when the contest is respecting the validity of any such election, as aforesaid, any candidate at the election, or any elector who gave or tendered his vote thereat * * may be relator for the purpose."

In the case where the validity of an election is the matter of contest, the relator must be "a candidate at the election, or an elector who gave or tendered his vote at the election."

In *Regina ex rel. White v. Roach*, 18 U. C. R., at p. 227, the late Sir John B. Robinson says: "The relator does not state positively and directly that he had himself voted at the election; * * he does not say that he gave a vote for any candidate at the election. The statute requires that the person who contests the election must have been either a candidate at that election, or an elector who gave or tendered his vote thereat." So that in order to the institution of *quo warranto* proceedings to set aside an election, it is essential that the statute be complied with by the relator shewing on his application for the *fiat* for the writ, that he was either a candidate, or an elector who voted or tendered his vote at the election.

The statement of the relator does not shew that he was a candidate, or that he was an elector, and voted or tendered his vote at the election. In fact the only ground on which the respondent's election is sought to be set aside, as disclosed in the relator's statement, is the want of property qualification by the respondent.

As to the second ground taken on the motion, the 186th section of the Consolidated Municipal Institutions Act, 1883, provides that "if the relator enters into a recognizance before the Judge or before a commissioner for taking affidavits, in the sum of \$200 with two sureties (to be allowed as sufficient by the Judge upon affidavit of justification) in the sum of \$100 each, conditioned to prosecute the writ with effect, or to pay the party against whom the same is brought any costs which may be adjudged to him against the relator, the Judge shall direct a writ of summons in the nature of a *quo warranto* to be issued to try the matters contested."

It is therefore a condition precedent to the issue of the *fiat* for the writ that the recognizance be entered into, in the manner prescribed by the statute, before a Judge or commissioner for taking affidavits, and unless taken before either one or the other, as provided by the section of the Act referred to, the recognizance would be worthless as a security for the respondent's costs, in the event of his succeeding on the trial of the *quo warranto* proceedings.

The recognizance in this case was entered into before a justice of the peace, and so is not a compliance with the statute, and is also invalid by reason of its not being a condition of the recognizance that the relator will prosecute the writ with effect. Besides the defect in entering into the recognizance before a justice of the peace, the recognizance was never allowed by the Judge, and until allowed the *fiat* for the writ should not have issued.

As I have come to the conclusion that the *fiat* for the writ, the writ, and all subsequent proceedings must be set aside, for the reasons already stated, I have not deemed it necessary to consider the other grounds of the motion, but on the fifth ground I am clearly of opinion that the relator's materials filed on the application for the *fiat* are clearly defective in not filing the affidavit of himself or of some other person or persons setting forth fully and in detail the facts and circumstances which shall support his application, as provided by the Rules of Court, Michaelmas Term, 14 Vic., Rule 2, *Harrison's Municipal Manual*, 4th ed. 984.

Mr. Boulton for the relator applied for leave to file a fresh statement, a new recognizance, and the necessary affidavit required by Rule 2 above referred to. But these are not irregularities which are the subject of amendment now ; as these were all pre-requisites to the granting of the *fiat*.

The respondent is entitled to his costs of the motion.

Should it be necessary, the respondent to have liberty to enter appearance.

RE HOOPER AND THE ERIE AND HURON RAILWAY
COMPANY.

Railway company—Notice of expropriation—Desistment.

A railway company at different times served H. with three several notices under the Dominion Railway Act, stating that portions of land owned by him were required for the company's line. To each of the first two notices H. replied by a notice appointing an arbitrator, but stating such appointment to be expressly without prejudice to his right to insist that the company had no right to take any part of his land. The company served successive notices of desistment from all their three notices, and H. gave notice that he objected to the third notice of desistment, and claimed that the company had no right to desist from their third notice of expropriation.

Held, that the company had not exhausted their powers of desistment, but had the right to desist from their third notice. H. could not be allowed to complain of the abandonment by the company of proceedings to compel him to sell his land to them when he had notified them at every opportunity that he intended to contest their right to compel him to do so; after they had acted upon his expressed intention and abandoned the notice to which he objected, it was too late for him to endeavour to insist upon its validity.

Grierson v. Cheshire Lines' Committee, L R. 19 Eq. 83, referred to.

[February 9, 1888.—*Street*, J.]

THIS was an application by Edward Hooper, under the Dominion Railway Act, for an order appointing a third arbitrator to ascertain the value of certain lands mentioned in a notice dated 29th July, 1887, served upon him by the railway company. The notice stated that the lands mentioned in it, being the whole of lots 27, 28, 29, and 30, with the water lots in front of the two last mentioned lots, all being in the town of Sarnia, were required by the railway company for the purpose of uniting its line with that of the Grand Trunk Railway, and for off-sets, switches, sidings, and yard purposes, and for the purpose of completing the main line of the railway. Accompanying the notice was the certificate of a Provincial Land Surveyor that these lands were required by the railway company for the purposes set forth in the notice, and that they were within the limits of deviation allowed.

The railway company opposed the application upon the ground that by notice dated 22nd October, 1887, they de-

sisted from the notice of 29th July, 1887. The applicant did not dispute that such a notice of desistment was given to him, but contended that the company had no right to give it, because they had given former notices, from which they had desisted.

The first notice given by the company was in July, 1886, in which they stated that they required lot 29 only. At this time they had not filed their plan and book of reference for the town of Sarnia. In August, 1886, they filed these, and on 15th September, 1886, they gave a new notice that they required parts of lots 27, 28, and 29, for the purposes of their right of way. On 29th July, 1887, they gave the notice now in question, requiring the whole of lots 27, 28, 29, and 30, with the two water lots, and at the same time gave notice desisting from their two former notices.

To each of these three notices Hooper, the applicant, replied by a notice, in which he appointed an arbitrator, but stated such appointment to be expressly without prejudice to his right to insist that the company had no right to take any part of his land. In October, 1887, after the last of these counter-notices had been given, and after the company had desisted from their three notices, and had given a new notice for a part of the land, the applicant gave notice that he objected to the notice of desistment of October, 1887, and claimed that the company had no right to desist from their notice of July, 1887, and claimed to have the right to proceed with an arbitration under that notice; but in case it should appear that the company were entitled to proceed under their notice of October, 1887, he appointed an arbitrator.

Wm. Macdonald, for Hooper, now moved to have a third arbitrator appointed under the notice of July, 1887, and contended upon the authority of *Moore v. Central Ontario R. W. Co.*, 2 O. R. 647, that the railway company had already exhausted their power of desisting before they desisted from the notice of July, 1887.

Lash, Q.C., for the company, contra.

STREET, J., (after stating the facts as above).—There can be no question about the right of the company to desist from the first notice. At the time it was given they had not filed their plan, and had no right to give the notice at all, and they could not expropriate the lands mentioned in it. This was known to Hooper, and, knowing it, he gave notice to the company, objecting to their right to take his land, intending to urge as an objection to their doing so, as his solicitor swears, that this plan and book of reference had not been filed. The notice under these circumstances was of no effect whatever, and the relation of vendor and purchaser never arose from it.

The second notice given by the railway company was after the filing of the plan and book of reference, and is admitted to have been in every way within their powers and the giving of it clearly constituted, upon the authority of *Doo v. London and Croydon R. W. Co.*, 1 Rail. Cas. 257 and the subsequent cases, a contract for the purchase by the railway company, and an obligation on the part of the applicant to convey upon payment of the purchase money; and these reciprocal rights could not be terminated unless by mutual consent or by the exercise of the company's statutory right to desist once, if this had not been already exhausted. This being the position of the parties, the applicant gives a notice in which he clearly intimates a desire to escape if possible from his obligation to convey, and an intention to contend that he cannot be compelled to do so. Having done this, I think he has given the railway company an opportunity to do that which they have in effect done, namely, to say in reply what in effect amounts to this: "As you don't wish to sell the land mentioned in our notice, we will not force you to do so, and therefore abandon it." The same opening was given by the applicant to the company when they served their third notice with this difference, that the property comprised in their notice was stated to be required for several purposes, some,

of which were purposes for which they could not under existing circumstances expropriate the whole of the land mentioned in their notice, and I think the same result must follow. I do not see how the applicant can be allowed to complain of the abandonment by the company of proceedings to compel him to sell his land to them, when he has notified them at every opportunity that he intended to contest their right to compel him to do so. After they have acted upon his expressed intention, and abandoned the notice to which he objected, it is too late for him to endeavour to insist upon its validity. See *Grierson v. Cheshire Lines' Committee*, L. R. 19 Eq. 83.

The motion must be dismissed, with costs.

REGINA V. DALY.

Criminal law—Conviction for vagrancy—Nature of offence.

The Act, R. S. C. ch. 157, sec. 8, (f.), provides that "all persons who cause a disturbance in any street or highway by screaming, swearing, or singing, or by being drunk, or by impeding or incommoding peaceable passengers * * are loose, idle, or disorderly persons within the meaning of this section."

The defendant was convicted and committed for that he "unlawfully did cause a disturbance in a public street * * by being drunk, and then was a vagrant, loose, idle, and disorderly person within the meaning of the Act respecting vagrants."

The evidence disclosed that the defendant was drunk, and that he was guilty of impeding and incommoding peaceable passengers, but it negatived his causing a disturbance in the street by being drunk.

Held, that no offence of the nature described in the conviction and commitment was committed by the defendant, and an order was made for his discharge.

[February 10, 1888.—*MacMahon*, J.]

ON the return of a *habeas corpus* with the conviction annexed, and the *certiorari* with a return of the information and evidence, *Morson* moved for the discharge of the prisoner from custody, on the ground that the conviction of the prisoner was for "unlawfully causing a disturbance

on a public street by being drunk," and that the evidence taken before the police magistrate clearly negated any disturbance being caused by the prisoner.

Delamere, shewed cause.

MACMAHON, J.—The Act, R. S. C. ch. 157, sec. 8 (*f.*), provides that, "All persons who cause a disturbance in any street or highway by screaming, swearing, or singing, or by being drunk, or by impeding or incommoding peaceable passengers * * are loose, idle, or disorderly persons, within the meaning of this section."

The evidence shews that on the date mentioned in the conviction the prisoner was drunk on Terauley street, (Toronto), and was staggering along the street, and that he was an obstruction to people passing. There was no disturbance further than he was impeding the peaceable passengers who had to pass around him to keep away from him.

The conviction and commitment are in the same form, that the prisoner "unlawfully did cause a disturbance on a public street, to wit, on Terauley street, by being drunk, and then was a vagrant, loose, idle, and disorderly person, within the meaning of the Act respecting vagrants."

If the prisoner was guilty of any of the offences mentioned in sub-sec. (*f.*), and has been convicted of any one of these offences, then the conviction and commitment must stand.

The prisoner was drunk, but the evidence completely negatives his causing a disturbance in the street by being drunk, which is the offence of which he was convicted. The evidence does disclose that he was guilty of impeding and incommoding peaceable passengers; but the prisoner was not convicted or committed for that offence.

Under R. S. C. ch. 178, sec. 87, no conviction or warrant for enforcing the same is to be held invalid for any irregularity, informality, or insufficiency therein, provided the Court or Judge before which or whom the question is raised is, upon perusal of the depositions, satisfied that an offence of the nature described in the conviction or warrant

has been committed, over which the justice has jurisdiction, and the punishment is not in excess of what might have been imposed for the offence.

I am not satisfied that an offence of the nature described in the conviction and warrant of commitment was committed by the prisoner, and consequently the prisoner must be discharged from custody.

There will be the usual order for protection to the magistrate.

GALL & CO. V. COLLINS.

Costs—Taxation—Solicitor's lien on fund—Locus standi of attaching creditor—Solicitor's negligence—Discretion of taxing officer—Certificate of taxation.

G., a judgment creditor of W. A. C., garnished a fund recovered by J. W. C., suing as the assignee of W. A. C. G. disputed the validity of the assignment from W. A. C. to J. W. C., and an issue was directed to be tried between G. and J. W. C., as to the portion of the fund which would remain after satisfying the claim of the solicitor of J. W. C., who had a lien upon the fund for his costs incurred in the recovery of it. Upon appeal from the taxation of these costs, before the trial of the issue;

Held, that G. had the right to be represented upon the taxation and appeal, as in one event he had an interest in the reduction of the solicitor's bill, and there could not be two taxations, one as against J. W. C., and the other as against G. if he succeeded in the issue.

The Court refused to interfere with the discretion of the taxing officer in allowing certain costs to the solicitor of proceedings which had been set aside in the action as irregular, and as to which G. alleged negligence and want of skill.

An informal certificate of taxation was written at the end of the bill of costs, shewing that it was taxed at so much, initialled by the taxing officer, and marked "filed" in his office.

Held, that this was not a sufficient filing of a certificate of taxation for the purposes of appeal, to satisfy the rule laid down in *Langtry v. Dumoulin*, 10 P. R. 244.

McCallum v. McCallum, 11 P. R. 179, distinguished.

[February 21, 1888.—*The Chancery Division.*]

AN appeal by the plaintiffs, Gall & Co., from an order of ROBERTSON, J., in Chambers, made on the 30th January, 1888, and from a ruling of BOYD, C., in Chambers, on the 6th February, 1888, following the order of ROBERTSON, J., upon one point.

Gall & Co., who were judgment creditors of W. A. Collins, attached a sum of money due, as they alleged, to W. A. Collins by the Niagara Assembly. On the return of the garnishing summons before the Master in Chambers six claimants of the fund appeared. The claims of four were for trifling amounts, and were ordered to be paid out of the fund attached. After payment of these there remained a sum of \$252, which was claimed by J. W. Collins as assignee of W. A. Collins. J. W. Collins had as such assignee brought an action against the Niagara Assembly, and obtained judgment against them for the amount now in question. Gall & Co. disputed the validity of the assignment to J. W. Collins, and an issue was directed to be tried between them. Mr. S. R. Clarke, the solicitor who had acted for J. W. Collins in his action against the Niagara Assembly, claimed a lien on the fund recovered for his costs of that action between solicitor and client, and his claim was allowed, and his costs ordered to be taxed and paid out of the fund; the issue to be tried after this was done. Mr. Clarke served his bill of costs and appointment for taxation upon the solicitors of Gall & Co., and they appeared upon the taxation before one of the taxing officers at Toronto, and exerted themselves to reduce the bill, which was brought in at \$253. Objections to the officer's taxation were put in both by Gall & Co. and Mr. Clarke, and upon the consideration of these objections before the officer J. W. Collins was represented. He had been Mr. Clarke's client in the action against the Niagara Assembly, but was now represented by another solicitor. The bill was finally taxed at \$122.

Gall & Co. appealed from the taxation to Robertson, J., in Chambers, on the 30th January, 1888, complaining that the taxing officer had improperly allowed Mr. Clarke the costs of serving a notice of trial, and the costs following thereon, including fee advising on evidence, briefs, subpoenas, notices to produce and admit, record, entering action for trial, fee with brief at trial, and the costs of a motion to set aside the notice of trial. The aggregate

amount taxed to Mr. Clarke upon these items was \$35, the taxing officer having moderated the amount considerably.

It appeared that on the last day for service of notice of trial for the Autumn Assizes at the place where the venue was laid, the defendants had filed their defence, and on the same day the plaintiff had delivered a reply, which was more than a mere joinder of issue, and with it served notice of trial. This notice of trial the Master in Chambers set aside with costs as irregular. (See Rules 176, 255.)

Robertson, J., held that Mr. Clarke was entitled to tax the costs objected to between solicitor and client, fraud and collusion not being alleged; and also held that Gall & Co. had no *locus standi* in the taxing office or upon appeal, J. W. Collins, Mr. Clarke's client, being represented in both forums.

Mr. Clarke brought on an appeal from the taxation before Boyd, C., in Chambers, on the 6th February, 1888, serving notice only upon the solicitor acting for J. W. Collins. Counsel, however, appeared without notice on behalf of Gall & Co., and desired to be heard. Boyd, C., felt bound to follow the decision of Robertson, J., as to the *locus standi* of Gall & Co., and accordingly ruled that they could not be heard; but he postponed the hearing of Mr. Clarke's appeal till after the next sittings of the Chancery Divisional Court, in order to allow Gall & Co. to appeal.

The appeal came on for argument before a Divisional Court composed of BOYD, C., and FERGUSON, J., on the 21st February, 1888.

Middleton, for Gall & Co., as to the position of judgment creditors protecting a fund attached, referred to *Cababé* on Interpleader, pp. 176, 177; *Drake* on Attachment, 6th ed., p. 680, sec. 677; R. S. O. ch. 140, sec. 43; and as to the question of the right of the solicitor to tax the costs of proceedings in which he shewed negligence or want of skill, referred to *Hart v. Frame*, 6 Cl. & F. 193; *Russell v. Palmer*, 2 Wils. 325; *Hill v. Featherstonhaugh*, 7 Bing. 569; *Huntley v. Bulwer*, 6 Bing. N. C. 111; *Cox v. Leech*,

1 C. B. N. S. 617; *Long v. Orsi*, 18 C. B. 610; *Thwaites v. Mackerson*, 3 C. & P. 341.

A. M. Grier, for Mr. Clarke, raised two objections to the appeal: (1) That the amount involved was only \$35, which was the aggregate of the items allowed by the taxing officer to which Gall & Co. objected, and therefore beneath the dignity of the Court; and (2) that no proper certificate of the taxing officer was filed, referring to *Langtry v. Dumoulin*, 10 P. R. 444.

[It appeared that at the end of the bill as taxed there was a sort of informal certificate shewing the amount at which the bill was taxed, with the taxing officer's initials, and this was marked as filed in the taxing office.]

As to the notice of trial, *Grier* contended that it was a matter of some doubt whether or not it was irregular, referring to *Weller v. Proctor*, 10 P. R. 323; *Hare v. Cawthrope*, 11 P. R. 353; and upon the question of negligence referred to *Pulling's Law of Attorneys*, 3rd ed., 328.

Hands, for J. W. Collins, submitted that the bill had been taxed sufficiently strictly by the taxing officer, and did not seek a further reduction.

Middleton, in answer to the objection as to the amount involved, contended that the appeals of both Gall & Co. and Mr. Clarke from the taxation were involved, and that the amount in question was therefore more than \$50. He also contended that the certificate filed was sufficient citing *McCallum v. McCallum*, 11 P. R. 179.

BOYD, C.—There is not much involved in this appeal. It may be that there is more than \$50 in question, but there is no strain upon the Court to allow the appeal when there is so little at stake. The parties should, in such a case, be strictly regular in their proceedings. It seems to me that the point is well taken that no proper certificate of taxation was filed. There is a sort of intimation at the end of the bill that it is taxed at so much, and it appears to be filed in the taxing office; but it should be filed in the Clerk of Records and Writs' office like a report, as

decided in *Langtry v. Dumoulin*. In *McCallum v. McCallum* the informal certificate was filed in the proper office, and it was acted upon by the issue of execution upon it.

I think the judgment of my brother Robertson as to *locus standi* of the judgment creditors was not well founded. All parties interested have the right to appear on taxation; there should be one taxation for all purposes—not one *quoad* the client, and then another if the judgment creditor turns out to be entitled to the fund. I think the judgment creditors here were entitled to attend upon the taxation and appeals.

There is no principle involved in the allowance to Mr. Clarke of the items connected with the notice of trial. The whole question was before the taxing officer; it was open to him upon the taxation to consider whether there was negligence, or partial negligence, or no negligence; and he finally passed in favour of allowing these items; a Judge on appeal did so also, and we should not interfere. The client did not object to these items being taxed, and the officer moderated them. There is no reason to doubt the *bonâ fide* attitude of the client; his interest is to reduce the solicitor's bill, for if he succeeds in the issue with Gall & Co., there will be more of the fund left for him. The appeal should be dismissed, with costs to Mr. Clarke, and costs as of a watching brief to J. W. Collins. Gall & Co. have partially succeeded, and instead of allowing them costs with a set-off, we shall direct that the taxing officer modify the costs of appeal to be allowed to Mr. Clarke.

FERGUSON, J., concurred.

Order accordingly.

BANK OF HAMILTON v. BAINE.

Reference—C. L. P. Act, sec. 197—Powers of Local Master—Absconding Debtors Act, secs. 8, 9.

Local Masters have no greater powers in matters coming before them in Chambers under the jurisdiction given them by the Ontario Judicature Act and 48 Vic. ch. 13, sec. 21 (O.), than those conferred upon the Master in Chambers, and from these powers the power of referring causes under the Common Law Procedure Act is excepted. A Local Master has, therefore, no power to make an order to proceed against an absconding debtor, upon default, after service of the writ of attachment, where such order contains a clause directing a reference under sec. 197 of the Common Law Procedure Act. It is intended by secs. 8 and 9 of the Absconding Debtors Act that only one order shall be made under which the plaintiff may proceed to judgment, and, therefore, where an order of reference is necessary the order to proceed must be made by a Judge who has jurisdiction to refer causes.

The expression "the referring of causes under the Common Law Procedure Act" is not restricted to causes which have been begun by writ of summons.

[February 7, 1888.—*Street, J.*]

THIS was an action against the defendant under the Absconding Debtors Act, ch. 68 R. S. O., and was begun by a writ of attachment issued from the proper office at Hamilton in the county of Wentworth.

On the 27th December, 1887, upon the application of the plaintiffs an order was made by J. E. O'Reilly, Esq., local Master at Hamilton, reciting personal service of the writ on the defendant on 28th November, and ordering "that if the defendant does not put in special bail to the said writ within the time therein limited therefor, the plaintiffs shall be at liberty to proceed by filing in the office of the deputy clerk of the Crown at Hamilton a declaration and notice to plead in eight days, otherwise judgment, and by posting up in said office a copy, &c., and if the defendant does not put in special bail within the time limited therefor, and plead or demur within said eight days, the plaintiff shall be at liberty on proof of such facts to sign interlocutory judgment, and on the amount of the plaintiffs debt being ascertained by S. H. Ghent, Esq., deputy clerk of the Crown at Hamilton, under the 197th section of the

C. L. P. Act, to whom such is hereby referred, that the plaintiffs may sign judgment thereon, together with their costs of suit to be taxed."

This order was amended on 7th January, 1888, by directing the reference to James Shaw Sinclair, Esq., Judge of the County Court of the county of Wentworth, instead of to Mr. Ghent.

On 9th January, 1888, interlocutory judgment was entered, and on the following day an appointment to assess the damages was obtained from the County Judge and served on the defendant's solicitors, who then for the first time became aware of the existence of the order of 27th December, 1887; the plaintiffs went on and assessed their damages before the County Judge.

On 14th January, 1888, notice of motion by way of appeal from the order of 27th December, 1887, and to set aside that order and all the proceedings taken under it, was given by the defendant, and came on for argument before Street, J., in Chambers on the 3rd February, 1888.

Aylesworth, for the motion.

Watson, contra.

STREET, J.—Objection is taken by Mr. Aylesworth on behalf of the defendant to the jurisdiction of the local Master at Hamilton to make the order, and also to the regularity of the proceedings subsequent to it.

By sec. 21 of ch. 13, 48 Vic. (O.), the local Master is given the same power and authority as the Master in Chambers in all proceedings which were at that time determined in Chambers in Toronto.

By Rule 420 of the Judicature Act the authority of the Master in Chambers is created, and by sub-sec. (a.) of the rule it is provided that he "shall not have authority or jurisdiction in respect of the matters excepted in regard to the clerk of the Crown and Pleas of the Court of Queen's Bench" by the rules of Hilary Term, 1870. Turning to those rules I find that "The referring of causes under the Com-

mon Law Procedure Act," is one of the matters excepted from the jurisdiction of the clerk of the Crown and Pleas of the Court of Queen's Bench.

Rule 420 of the Judicature Act is amended by Rule 548, which gives to the Master in Chambers the powers of a Judge sitting at Chambers save in the matters excepted by sub-sec. (a.) of Rule 420.

Sec. 13 of ch. 13, 48 Vic. (O.), which somewhat further extends the jurisdiction of the Master in Chambers, still excepts from his jurisdiction the matters excepted by sub-sec. (a.) of Rule 420.

The local Masters, then, do not appear to have any greater powers than those conferred upon the Master in Chambers, and from those powers the power of referring causes under the Common Law Procedure Act has always been expressly excepted.

The order of the Local Master in this case has been made evidently with the intention of carrying into effect the 8th and 9th sections of the Absconding Debtors' Act, ch. 68 R. S. O. Section 8 provides that "in case it is shewn by affidavit to the Court or a Judge having jurisdiction in the case, that a copy of the writ" was served, &c., &c., "such Court or Judge may authorize the plaintiff to proceed in the action in such manner, and subject to such conditions as the Court or Judge may direct or impose." And section 9 provides that "Before the plaintiff obtains judgment he shall prove the amount of the debt or damages claimed by him in such action, either before a jury on an assessment, or by reference as provided in the Common Law Procedure Act, according to the nature of the case," &c.

The provision of the C. L. P. Act here referred to is sec. 197, which provides that "in actions in which it appears to the Court or a Judge that the amount of damages sought to be recovered by the plaintiff is substantially a matter of calculation, it shall not be necessary to assess the damages by a Judge or jury, but the Court or a Judge may direct that the amount for which final judgment is to be signed shall be

ascertained * * (if the proceedings are carried on in the deputy clerk's office in any county) by the Judge of the County Court of such county * * and such Judge of the County Court shall endorse upon the rule or order for referring the amount of damages to him, the amount found by him, and shall deliver the rule or order with such endorsement to the plaintiff, and the like proceedings may thereupon be had, as to taxation of costs, signing judgment and otherwise, as upon the finding of a Judge or jury upon an assessment of damages."

If it was intended by the 8th and 9th sections of the Absconding Debtors Act, as I think it was, that only one order should be made, under which the plaintiff might proceed to judgment, and not that a second order should be necessary before a reference could be had, then the expression, "the Court or a Judge having jurisdiction in the case," must, of course, mean a Judge authorized to make the whole of such an order, including an order of reference where such an order of reference is necessary; and in determining the question as to what Judge has "jurisdiction in the case," regard must be had to his power to make the order of reference, which must, in certain cases, form part of the order directing how the plaintiff is to proceed to judgment under section nine of the Absconding Debtors Act.

The powers of the local Master do not extend to "the referring of causes under the Common Law Procedure Act:" under the Absconding Debtors Act the plaintiff is to prove his debt "by reference as provided in the C. L. P. Act." If such a reference is the referring of a cause under the Common Law Procedure Act, then the Local Master plainly has no jurisdiction to make such an order as is attacked by this motion: otherwise he has.

I think that the expression "the referring of causes under the Common Law Procedure Act," means "the referring of causes *under the provisions* of the Common Law Procedure Act," and is not restricted to causes which have been begun by writ of summons; and that the expres-

sion, "by reference as provided in the Common Law Procedure Act" means "by reference *under the provisions* of" that Act: that therefore a reference under the Absconding Debtors Act comes clearly within the exception to the powers of the local Master, and that he had no jurisdiction to make this order.

A contrary construction would lead to the result that a local Master would have jurisdiction to direct a reference to ascertain the amount due upon a debt where the plaintiff had proceeded under the Absconding Debtors Act, but would have none to direct a reference to ascertain the amount due upon the same debt where the plaintiff had proceeded by writ of summons: and to the further result that the local Master would have power to direct a reference to the County Judge, but that the County Judge would have no power to direct a reference to the local Master. Such anomalies would of course not be conclusive upon the construction to be put upon the jurisdiction of the local Master, but a construction which avoids them is to be preferred, if possible, to one which creates them.

The objections taken to the regularity of the proceedings subsequent to the order would, I think, have rendered it necessary that they should be set aside, but in the view that I have taken of the jurisdiction of the Local Master, it is not requisite that I should consider the other objections.

The order of 27th December, 1887, and all the subsequent proceedings must be set aside; the costs of this motion to be costs to the defendant in any event.

INTERNATIONAL WRECKING CO. V. MURPHY ET AL.

Company—Shareholders—Use of corporate name in litigation.

A corporation has the same right as an individual to withdraw its name from litigation to which it has been made a party plaintiff, but of which it does not approve. The company itself is the proper plaintiff in actions for injury to the corporate property, and such an action by shareholders alone, shewing no reason why the company has not instituted the proceedings, cannot be sustained.

But where the complaint was that a majority of the shareholders had obtained possession of the company's name and the control of its affairs, and were using it improperly for their own benefit, and causing injury to the company's property ;

Held, that an action could be sustained in the name of one or more shareholders, on behalf of themselves and all others, except the defendants, against the company and the majority of the shareholders.

[February 25, 1888.—*Street, J.*]

THE plaintiffs were an incorporated company ; the defendants were the President and Secretary of the company, and certain of its shareholders.

The statement of claim alleged that the defendant S. A. Murphy, who is the president of the company, and two of the other defendants held a large majority of the shares of the company, and had its affairs under their complete control, and that they had used their power to defraud the company in various ways, which were set out at length, and that the other shareholders, owing to their being in a minority, were unable to obtain redress.

The defendants the Murphys moved before the Master in Chambers to strike out the name of the company, and stay the proceedings, on the ground that the shareholders in whose interest the action was brought, had no right to use the company's name as plaintiffs. An order was made upon that motion, that the names of the two shareholders bringing the action should be added to that of the company as plaintiffs. The Murphys now appealed from this order, and the appeal was argued before Street, J., in Chambers on the 21st February, 1888.

Hoyles, for the appeal.

C. J. Holman, for the plaintiffs, contra.

STREET, J.—The numerous cases upon questions of this nature have, I think, settled the principles upon which the Courts act in regard to them.

The general right of a corporation to withdraw the use of its name from litigation to which it has been made a party plaintiff, but of which it does not approve, does not appear to differ from the right of an individual under the same circumstances, and the Court, upon being satisfied that the corporate name is being used against the will of the majority of the shareholders, will always order it to be struck out.

The general rule is, that the company itself is the proper plaintiff in actions for injuries to the corporate property, such as are set out in the statement of claim here, and an action by shareholders alone complaining of such injury, and shewing no reason why the company had not instituted the proceedings, could not be sustained: but where it is shewn, as it is here, that the majority of the shares in the company are held by persons defendants in the action, who have themselves caused the injuries and committed the acts complained of, then an action may be sustained in the names of one or more shareholders on behalf of themselves and all others, except the defendants, against the company and the shareholders holding the majority of the stock, whose acts are complained of: *Atwool v. Merryweather*, L. R. 5 Eq. 464 (*n.*); *Menier v. Hooper's Telegraph Works*, L. R. 9 Ch. 350; *Mason v. Harris*, 11 Ch. D. 97.

The reason for this exception to the general rule is, that if it were not allowed, the minority would be without a remedy.

A plaintiff, however, who brings an action in the name of the company, and admits while doing so that the company is controlled by the persons against whom he brings his action, and against whom he charges the acts of fraud and dishonesty of which he complains, and that, in fact, he has no authority to use the name of the company, plainly disentitles himself to maintain his action in that form; he

has to choose between two courses, he must bring his action in the name of the company if he can obtain its authority to do so: if he can not do so, then he may bring it in the name of the shareholders who complain, on behalf of themselves and all other shareholders, except the defendants, making the company and the other shareholders defendants.

The complaint here is that a majority of the shareholders have obtained possession of the company's name and the control of its affairs, and are using it improperly for their own benefit: that is just such a case as the exception to the general rule above mentioned is intended to apply to.

The pleadings and affidavits disclose a state of things shewing that it would be useless to the minority to have a meeting called to ascertain who has really the majority of the shares properly issued: the defendants are admittedly the *de facto* rulers of the company. See *Gray v. Lewis*, L. R. 8 Ch. 1035; *Russell v. Wakefield*, L. R. 20 Eq. 474; *Pender v. Lushington*, 6 Ch. D. 70; *Duckett v. Gover*, 6 Ch. D. 82; *Silber Light Co. v. Silber*, 12 Ch. D. 717; *Cape Breton Co. v. Fenn*, 17 Ch. D. 198; *Harben v. Phillips*, 23 Ch. D. 14; *McMurray v. Northern R. W. Co.*, 22 Gr. 476; *S. C.*, 23 Gr. 134.

Some of the charges in the statement of claim here, are of acts *ultra vires* the company, to restrain which an action would clearly lie by any shareholder on his own behalf, as in *Hope v. International Financial Society*, 4 Ch. D. 327, and *Guinness v. Land Corporation*, 22 Ch. D. 349.

I think the order of the learned Master in Chambers should be varied by striking out the name of the company as plaintiffs, and adding them as defendants, with leave to the plaintiffs to amend their statement of claim as they may be advised.

The costs of the motion and of the appeal should be costs in the cause to the defendants in any event.

GREENE ET AL. V. WRIGHT.

Judgment—Motion under Rule 324—Material necessary.

In order to obtain under Rule 324 a speedy judgment before the time for appearance in an action has expired, a plaintiff must shew that some injury or injustice is likely to happen or to be done to him if he is not awarded immediate relief.

And where the affidavit of a plaintiff stated that he verily believed it was necessary for the plaintiffs to get immediate judgment in order to protect their interests and prevent any disposition of the estate that might be prejudicial to the creditors, but no facts were set out upon which such belief was founded, and the utmost shewn was that the defendant was in financial straits, and had refused to submit his affairs to investigation or to make an assignment ;

Held, that a motion under Rule 324 for judgment before appearance must be refused.

[March 3, 1888.—*Rose, J.*]

THE plaintiffs issued the writ of summons in this action on the 27th February, 1888, and on the same day obtained an order for leave to serve a notice of motion for judgment under Rule 324 for the following day.

The notice was served, and the motion came on before *Rose, J.*, in Court, on the 28th February.

No appearance was entered, and no counsel appeared for the defendants in answer to the motion.

B. E. Bull, for the motion.

ROSE, J.—The plaintiffs' material shews a debt overdue; a statement made by the debtor of assets \$6,688.97, and liabilities \$6,700; an offer of 50c. on the dollar, which the plaintiffs refused; a refusal by the defendant to comply with a request by the plaintiffs to submit his affairs to the investigation of an independent party; and a further refusal to make an assignment. The defendant did not appear on the motion.

There is no fact stated from which I can draw the inference that the defendant has made, or is about to make, any improper disposition of his assets, or that other creditors are pressing their claims in any manner prejudicial to the plaintiffs, or that speedy judgment is necessary to

preserve the plaintiffs from loss or risk of loss. The only statement in the affidavit pointing in that direction is that of one of the plaintiffs, that he verily believes it is necessary that the plaintiffs should get immediate judgment in this action, in order to protect their interests and to prevent any disposition of the estate that might be prejudicial to the interests of the creditors; but no facts are set out upon which such belief is founded.

The facts stated do not bring the case within the reported decisions of *Francis v. Francis*, 9 P. R. 209; *Kinloch v. Morton*, 9 P. R. 38; *Lucas v. Fraser*, 9 P. R. 319.

Unless I am prepared to hold that a debtor being in financial straits, and refusing at the instance of a creditor to submit his affairs to investigation, or to make an assignment, renders him liable to have immediate judgment granted against him, I cannot grant this motion.

I think if I so decided I should be legislating, and not interpreting the rule as it has been understood.

The plaintiff, to obtain judgment under this rule, must, in my opinion, shew that some injury or injustice is likely to happen or be done to him if he is not awarded immediate relief, but is compelled to await the expiry of the time provided by the Rules of Court in ordinary cases. It was shewn on the argument that, after the motion was launched, the defendant had made an assignment: this, of course, does not assist the plaintiffs.

The motion must be refused. As no cause was shewn, there will be no costs.

HARDY V. PICKARD.

Costs—Omission to order at trial—Subsequent order—Rule 333.

The trial Judge received judgment and afterwards delivered a written judgment in the plaintiff's favour, but inadvertently omitted to make any order as to costs.

Held, that the case came within Rule 338, and that the Judge had power, even after an appeal to a Divisional Court which left his judgment undisturbed, to make an order as to costs.

Fritz v. Hobson, 14 Ch. D. 542, followed.

[February 24, 1888.—*Rose, J.*]

A MOTION in Chambers, by the plaintiff, for an order for payment by the defendant of the costs of the action, under the circumstances appearing in the judgment.

R. A. Dickson, for the motion.

W. M. Douglas, contra.

ROSE, J.—At the trial herein I reserved judgment, and afterwards delivered a written judgment in the plaintiff's favour. This judgment was moved against before the Divisional Court, and was sustained.

In giving judgment I inadvertently omitted making any order as to costs. I cannot now remember whether I thought of the matter at all, or whether it escaped my attention. Certainly, if I thought of it, I did not determine not to give the plaintiff his costs. I know of no reason why he should not have them, having fully succeeded as to his claim. If I adjudicated at all, I have no doubt it was in his favour.

The plaintiff's solicitors considered that, with the judgment in the plaintiff's favour, he was entitled to costs, and so, after the judgment of the Divisional Court was delivered, signed judgment for the claim, including costs, the local registrar acceding to the contention that the plaintiff was, under the judgment, entitled to have his costs taxed and included in the judgment.

On motion before the learned Master in Chambers, the judgment was varied by striking out the provision as to

costs, whereupon Mr. Dickson, on behalf of the plaintiff, applied to me for an order for costs.

To this Mr. Douglas shewed cause, citing *McNabb v. Oppenheimer*, 11 P. R. 214; *Re Doyle v. Henderson*, 12 P. R. 38; *In re Adam Eyton*, 36 Ch. D. 299, 301; *London and Lancashire Ins. Co. v. British America Ass. Co.*, 52 L. T. N. S. 385, at p. 387.

I quite assent to the argument that if I had in any wise adjudicated as to costs, I could not now reopen the matter, and vary my judgment; but I have not, or if I have, it was in the plaintiff's favour, and by accidental slip or omission I did not state the result in the order.

The omission to direct as to costs was an accidental and not intentional one, whether the omission was in not considering the question, or in not making a record of my judgment.

I think, therefore, the case comes clearly within Rule 338, Judicature Act, Ontario, which provides that "clerical mistakes in judgments, or orders, or errors arising therein from any accidental slip or omission may at any time be corrected by the Court or a Judge on motion without an appeal." *Fritz v. Hobson*, 14 Ch. D. 542, is referred to in Maclellan's 2nd ed. of the Judicature Act at p. 449, in a note to the above rule. The head-note is as follows:

"A motion for an interim injunction was adjourned to the trial of the action. No provision was made for the costs of the motion, and liberty to apply was not expressly reserved. At the trial judgment was given for the plaintiff on the substantial question at issue, with the general costs of the action, less £10 for the costs of an issue upon which he had substantially failed. The plaintiff's counsel omitted to ask for the costs of the adjourned motion, and no express provision was made for them. Liberty to apply to the Court was expressly reserved. The judgment having been drawn up, passed, and entered, the taxing Master refused to allow the plaintiff the costs of the adjourned motion. The plaintiff then applied to the Court by motion, asking that the judgment might be varied or corrected by giving him the costs of the adjourned motion:—

"*Held*, that either under the liberty to apply reserved by the judgment, or under the liberty to apply implied in the order adjourning the motion, or by virtue of order 41 *a.*, (the same in terms as Rule 338,) the Court had jurisdiction to order the payment of the costs in question. And a separate order was made, directing the taxation and payment of the plaintiff's costs of the motion."

The motion must be granted, and the order will be similar in terms to that in *Fritz v. Hobson*, and following the precedent in that case, I will give the plaintiff the costs of this motion, as I think the defendant should not have placed so many difficulties in the way of the plaintiff obtaining costs, to which he was so clearly entitled, that no suggestion of a reason for withholding them was made, save that by a slip or omission the Court was powerless to grant them.

RE HARRIS.

Quieting titles—Advertisement—Irregularity—Waiver.

Where the advertisement in a Quieting Titles proceeding was posted at another Court House than that required by G. O. Chy. 504 ; *Held*, that the irregularity might be waived under R. S. O. (1887) ch. 113, secs. 45, 46.

[February 25, 1888.—*Boyd, C.*]

THIS was a proceeding under the Quieting Titles Act, in which the Referee of Titles at Toronto had given the usual direction for posting a copy of the advertisement at the Court House, "of the county where the land lies," as required by G. O. Chy. 504. By mistake of the petitioner's solicitor, the advertisement was posted at the Court House of Dufferin, which was nearest to the land in question, instead of the Court House of Peel, in which county the land was situate.

Upon the matter being submitted to BOYD, C., by the Referee, he directed that the objection to the irregularity of the publication of the advertisement should be waived, having regard to the provisions of R. S. O., (1887) ch. 113, secs. 45, 46.

Elgin Myers, for the petitioner.

MACLENNAN V. GRAY ET AL.

Appeal from Master's ruling—Time—Reading depositions taken on former application—Estoppel.

An appeal from the ruling of a Master in the course of a reference should be brought on within a month from the date of the ruling, irrespective of the date of the certificate of such ruling.

In a mortgage action there was a reference to a Master for sale, &c. After sale and satisfaction of the plaintiff's claim out of the proceeds, a balance remained in Court, which R. G. applied to the Master to have paid out to her. Upon such application R. G. was examined before the Master, who refused the application. An order was afterwards made by a Judge referring to the Master to ascertain who was entitled to the fund, and to settle priorities. Upon such reference the Master ruled that the depositions of R. G. taken upon the former application could be read.

Held, reversing the decision of ROBERTSON, J., in Chambers, that the depositions could be read subject to the right of A., an opposing claimant of the fund to cross-examine R. G. upon them; R. G. to attend for such cross-examination upon payment of conduct money by A.

Held, also, that A. was estopped from appealing from the Master's ruling by reason of his not having objected to the evidence being referred to at a certain stage of the proceedings.

[February 21, 1888.—*The Chancery Division.*]

THIS was a mortgage action, in which the usual judgment for sale, with a reference to the Master in Ordinary, was obtained on the 15th March, 1886. After the Master had made his report, an application was made to him, by Rosanna Gray, for leave to prove for her dower against the money which remained in Court after satisfaction of the plaintiff's claim. On this application, after an objection had been taken to the Master's jurisdiction, and the objection had been argued, and the Master's decision reserved, the applicant Rosanna Gray, being then present in the Master's office, was examined before the Master, and cross-examined by the solicitor for Allen, an incumbrancer, subject to the objection as to jurisdiction. The Master finally decided that he had no jurisdiction to entertain the application. Rosanna Gray then applied to a Judge in Chambers, and on the 27th September, 1887, an order was made by Ferguson, J., referring it to the Master to ascertain whether she was entitled to be paid any portion of

the surplus moneys in Court in respect of her claim for dower, and for an annuity, and to settle the priorities between her and certain incumbrancers.

In the proceedings before the Master under this order the solicitor for Rosanna Gray, on the 8th December, 1887, proposed to put in the evidence taken on the former application, which was objected to by the solicitors for Allen and Coughlin, two of the incumbrancers. The Master on that day ruled that the evidence should be admitted, but the evidence was not then put in, and it was agreed between the parties that a preliminary question on the construction of a will should be determined before any evidence was given. This argument was then proceeded with, and it was said that a fact was referred to on the argument only established by the evidence. On the 12th January, 1888, the Master delivered his judgment on the question, and an appointment was made to take evidence in support of the claim of the widow, and on the return her solicitor put in her depositions. Allen again unsuccessfully objected to their admissibility, and obtained a certificate from the Master of his ruling, dated 12th January, 1888. The certificate was filed with the Clerk of Records and Writs on 17th January.

The appeal was set down, and came on for argument on 30th January, 1888, before Robertson, J., in Chambers, who gave judgment on the 2nd February, 1888, allowing the appeal, and reversing the Master's ruling, and overruling an objection taken by Rosanna Gray that the appeal was too late.

Rosanna Gray appealed from the order of Robertson, J., and the appeal came on for argument before a Divisional Court composed of Boyd, C., and Ferguson, J., on the 21st February, 1888.

A. C. F. Boulton, for Rosanna Gray. By G. O. Chy. 642 an appeal from a Master's ruling must be brought on for argument within a month from the *making of such ruling*. The time should run from the date when the ruling was

made, that is, the 8th December, 1887, and not from the day when Allen made up his mind that the ruling would prejudice him, and obtained a certificate for the purpose of appeal. See *Dayer v. Robertson*, 9 P. R. 78 ; *Walmsley v. Griffiths*, Cassels' Supreme Court Dig., p. 416. Allen is also estopped from objecting to the reception of the evidence by his not objecting when it was referred to on the argument before the Master on the 22nd December, 1887 ; *Re Burrowes*, 18 C. P. 493 ; *Ringland v. Lowndes*, 9 L. T. N. S. 479. The evidence was properly admitted by the Master ; the issues being between the same parties, and of the same nature, and the appellant having been cross-examined by the solicitor for Allen : *Adamson v. Adamson*, 28 Gr. at p. 224.

Middleton, for Allen, contra. A certificate of a ruling is precisely the same as a report, and as long as it is not confirmed, an appeal may be taken from it ; it is not confirmed until a month from the making and fourteen days from its filing have elapsed : G. O. Chy. 252, 642 ; *Re Eaton*, 8 P. R. 289 ; *Mitchell v. Mitchell*, 22 Gr. 23 ; *Chennel v. Martin*, 4 Sim. at p. 344. The appeal could not be had until the certificate had issued, and the appeal is and must be from the certificate : *Chennel v. Martin*, *supra*. There was no object in appealing until the depositions were put in. The proceeding before the Master in which the evidence of Rosanna Gray was taken was *coram non judice* ; the Master had no power to make any order as to the surplus money in Court, or to do anything after he had made his report, until the case was again referred to him by order of a Judge, and the Master has so decided, and his decision was not appealed from ; the evidence taken on such application could not be used in any proceeding. Even if the evidence was taken in a proceeding properly before the Court, it could not be used, unless it was impossible to produce the deponent for examination again. The evidence was at the best but secondary evidence, and no foundation had been laid for its reception : see *Taylor* on Evidence, 8th ed., secs. 464, 465 ; *Stephen* on Evidence, 5th ed., Art.

32. Rosanna Gray is now out of the jurisdiction, and this is an attempt on her part to avoid examination in open Court.

BOYD, C.—We must hold that the appeal from the Master's ruling was not in time, not being brought on within a month of the ruling. The appeal is from the ruling, not from the certificate.

The respondent is, besides, estopped by his not having objected to the evidence being used on the argument as to Rosanna Gray's right of election. He should not be allowed to lie by until the Master rules against him on the question of election, and then to appeal from his ruling as to the evidence.

We also think the evidence admissible, if guarded by a provision that Allen shall have the right to cross-examine upon it. Rosanna Gray must be produced by her solicitor for cross-examination, upon Allen's paying her conduct money ; and upon his undertaking to do so being given, the appeal should be allowed, with costs.

FERGUSON, J., concurred.

Appeal allowed, with costs.

RE SMART, INFANTS.

Infants—Custody—Habeas corpus—Petition—Rule 474, O. J. A.

The order of FERGUSON, J., *ante* p. 312, was affirmed with one variation, viz., the *habeas corpus* to run concurrently with the petition directed to be filed, and to be disposed of with it.

[February 27, 1888.—*The Chancery Division.*]

DAVID SMART, the father of the infants, appealed from the order of FERGUSON, J., *ante* p. 312, directing that a petition should be substituted for the *habeas corpus* proceedings instituted by the appellant to obtain the custody of the infants.

The appeal came on to be heard before a Divisional Court, composed of BOYD, C., and ROBERTSON, J., on the 27th February, 1888.

J. Maclellan, Q.C., for the appeal. The learned Judge had no power to make the order appealed from; the appellant has a right to his remedy by *habeas corpus* that cannot be interfered with [BOYD, C.—Subject to what counsel for the mother may say, we have no objection to allow the *habeas corpus* to run concurrently with the petition.] *S. H. Blake*, Q.C., for the mother—I will consent to that. *Maclellan*—But we say we cannot be forced to file a petition: the *Agar-Ellis Case*, 24 Ch. D. 317, is in our favour. [BOYD, C.—But that is modified by *Re Ethel Brown*, 13 Q. B. D. 614.] In that case the *habeas corpus* was refused because there was a doubt as to the marriage; in this case it was granted, and we were inquiring into the truth of the return when this order was made. The Court has no discretion to refuse a *habeas corpus*: *Re Andrews*, L. R. 8 Q. B. 153. The only difference between this and other cases under *habeas corpus* is, that agreements have been entered into between the father and mother. An agreement by a father to part with the custody of his children is illegal. In *Queen v. Smith*, 22 L. J. Q. B. 116, an agreement that was set up was held no answer to a

habeas corpus. The law in England is different now, since the statute 36 & 37 Vic. ch. 12 was passed, legalizing such an agreement. But there is no such law here, or at least none applicable to this case. *Re Besant*, 11 Ch. D. at p. 511, shews that but for the statute a father could not part with the custody or control of his infant children. There is no decision under which we can be compelled to file a petition so as to give the Court greater jurisdiction: *Simpson on Infants*, 129; *Macpherson on Infants*, 153.

H. J. Scott, Q.C., on the same side. The Court has no right to decline to decide upon our proceedings, and to order other proceedings to be taken. How can we be forced to petition for relief we do not want? The litigant must be master of his own litigation. The Court of Chancery had jurisdiction only over wards of Court.

S. H. Blake, Q.C., and *H. Cassels*, contra, were not called upon.

BOYD, C.—The learned Judge by the order he made gave effect to the provisions of Rule 474, which provides that all necessary amendments may be made for determining the real question raised by or depending on the proceedings, &c. It was a matter purely in his discretion, and we do not interfere. We modify the order so that the *habeas corpus* shall run concurrently and be disposed of with the petition. In other respects the order must be affirmed. Costs will be reserved to be disposed of with the other costs of the matter.

ROBERTSON, J., concurred.

Order varied accordingly.

RE CURRY.

Arbitration—Extending time for making award—Death of party—No provision for appeal—Statute of Limitations.

Two persons submitted certain matters in dispute between them to the award of a barrister of character and standing. The submission provided that the death of either party should not operate as a revocation of the power and authority of the arbitrator; there was no provision for an appeal from his award. The arbitrator allowed the time for making his award to run out before entering on the reference. One of the parties had died since the submission, and the survivor now applied to the Court to enlarge the time. It appeared that the Statute of Limitations had so run since the submission as to bar portions of the applicant's claim.

Held, reversing the decision of Rose, J., that the facts of the death and the absence of the right of appeal would not warrant the Court in refusing to enlarge the time, and that under the circumstances no injustice would be done by enlarging it.

[February 6, 1888—*The Queen's Bench Division.*]

AN appeal by James Curry from an order of Rose, J., in Chambers, refusing to extend the time for F. R. Ball, Q.C., of Woodstock, to make his award upon a submission to him of matters in dispute between the applicant and his brother, George Curry, since deceased.

The motion was argued before a Divisional Court composed of Armour, C. J., and Street, J., on the 9th December, 1887.

Aylesworth, for James Curry.

H. J. Scott, Q. C., for the personal representative of George Curry.

The following judgment, in which the facts appear, was delivered on the 6th February, 1888.

ARMOUR, C. J.—The inadvertent omission of the arbitrator to enlarge the time for making his award has frequently been held to afford good cause for the Court or a Judge to enlarge it.

It would seem from the affidavits filed that our refusal to enlarge it may work injustice to the applicant, for it is said that the Statute of Limitations may have so run

since the submission was entered into as to bar portions of the applicant's claim.

We ought not to enlarge the time if we see that any injustice will be done by our doing so.

I do not think that the fact that one of the parties to the submission has died is any reason for our refusing to enlarge the time, for the parties by the submission provided that the death of either party should not operate as a revocation of the power and authority of the arbitrator.

Nor do I think that the fact that the submission does not provide for an appeal from the award is any reason for our refusing to enlarge the time, for the parties agreed by the submission that the award should be final and conclusive. In *Willesford v. Watson*, L. R. 8 Ch. App. 473, James, L. J., said: "With regard to one argument pressed upon us—that we ought not to send the matter to arbitration, because the arbitrator would decide without appeal—I can easily conceive that two sensible men may possibly have had that in their view, and that they would prefer even running the chance of the arbitrators making a mistake to having every matter brought into a Court of Law, or into the Court of Chancery, to be heard before a Vice-Chancellor, with an appeal to this Court, and then perhaps an ultimate appeal to the House of Lords. I can conceive that sensible men may prefer an arbitrator even to being at liberty to carry one another through litigious proceedings in three successive Courts."

I cannot see that any wrong or injustice will be worked by our enlarging the time for making the award.

The arbitrator is a professional man of character and standing, and the rights of the respective parties will no doubt be safe in his hands.

The time will therefore be enlarged for three months.

It is not a case for costs.

I refer to *Edwards v. Davies*, 23 L. J. N. S. Q. B. 278; *Bowen v. Williams*, 6 D. & L. 235; *Lord v. Lee*, L. R. 3 Q. B. 404; *Denton v. Strong*, L. R. 9 Q. B. 117.

STREET, J., concurred.

Appeal allowed.

BANK OF HAMILTON V. BAINE, (2).

Absconding debtor—Successive applications for writ of attachment—Fact of prior application not disclosed—Cause of action—Particularity in stating.

An application was made to a County Judge for an order to issue a writ of attachment under the Absconding Debtors' Act; the Judge did not finally determine against the application, but gave leave to renew it upon a further affidavit.

Held, that there was no reason why the application should not afterwards be made to another Judge.

Semble, also, that where a Judge refuses to grant an attachment or an order to hold to bail, successive applications may be made to successive Judges upon the same material, and an order granted by any one of them will be as valid as if it had been made by the first one; but in the case of a subsequent application upon the same or different material the Judge should always be informed of every previous application; this, however, more as a matter of propriety than of legal right, and an omission to do so would not be a ground for setting aside the order, if the material warranted the granting of it.

Held, also, that the same particularity in stating the cause of action is not required when a Judge has to make an order for a writ of attachment or to hold to bail, as was required in an affidavit to hold to bail when no order of a Judge was required, nor as when personal liberty is involved.

[March 9, 1888.—*The Queen's Bench Division.*]

THIS was an application by the defendant to set aside a writ of attachment, issued by the plaintiffs under an order of the Master in Chambers of the 24th November, 1887, under the Absconding Debtors Act.

It appeared that on the 23rd November, 1887, the plaintiffs applied to the County Judge of Wentworth for an order to issue the writ, but the Judge was of opinion that the cause of action was not sufficiently stated by the affidavit read to him of an officer of the plaintiffs, and gave leave to renew the application before him, on a further affidavit. The plaintiffs, instead of doing this, moved on the following day before the Master in Chambers upon the affidavit read to the County Judge, and an additional affidavit made by another officer of the plaintiffs. The Master was not informed of the fact of the application to the County Judge. The first affidavit stated that the defendant was indebted to the plaintiffs for money lent and as indorser of promissory notes, and the second that part of the debt was

for an overdraft, and the balance upon overdue notes indorsed by the defendant.

The motion was made in the first place to STREET, J., in Chambers, who upon the 23rd December, 1887, gave judgment dismissing the motion.

The defendant then appealed, and his appeal was argued before a Divisional Court composed of Armour, C. J., and Falconbridge, J., on 13th February, 1887.

Aylesworth, for the appeal. The application to the Master in Chambers after the County Judge had refused the writ was unauthorized and improper: *Tilt v. Dickson*, 4 C. B. 736; *Moody v. Dougall*, 9 U. C. L. J. 238; *Pratt v. Jones*, 10 U. C. L. J. 271. This is no more than an application of the general principle of *res judicata*. The plaintiffs had the right to move the Court, but not to go to another Judge; if they could do that they might have gone to all the Judges in turn. Where a writ is refused the practice is to appeal from such refusal: *Waddell v. Corbett*, 26 U. C. R. 243; *Small v. Eccles*, 3 P. R. 189; *Herr v. Douglass*, 4 P. R. 102; *Heyland v. Scott*, 18 C. P. 52; *In re Allen*, 31 U. C. R. 458.

The order is equally bad because of the suppression of the fact that an application had previously been made; on an *ex parte* application *uberrima fides* is required, and the want of it is a ground for rescission. See *Van Norman v. McLennan*, 2 U. C. L. J. N. S. 207.

Besides, the cause of action was not sufficiently shewn on the application. It is not said how the notes were indorsed by the defendant—perhaps they were without recourse; and there is no word or suggestion as to presentment or notice of dishonour.

It was also argued that the defendant was not shewn to be an absconding debtor within the meaning of the Act.

McCarthy, Q. C., for the plaintiffs, contra, cited *Jones v. Gress*, 25 U. C. R. 594; *Scott v. Mitchell*, 8 P. R. 518.

Aylesworth, in reply, referred to *Simpson v. Dick*, 3 Dowl. 731; *Hopkinson v. Salembier*, 7 Dowl. 493; *Ross v. Hurd*, 1 P. R. 158.

Judgment was delivered 9th March, 1888.

ARMOUR, C.J.—I draw the conclusion from the affidavits filed that the learned Judge of the County Court had not finally determined against the plaintiffs' application for an order for the issue of a writ of attachment, and if he had not, I can see no valid reason why application could not be made to another Judge.

Indeed, I can see no valid reason why, where an application for an order for an attachment or for an order to hold to bail is made to a Judge, and he refuses to grant it, successive applications may not be made to successive Judges for the order upon the same material, and why the order if granted by any one of such successive Judges is not as valid as if it had been made by the Judge first applied to.

If it were not so, the whim or caprice of a Judge in refusing such an order might result in the loss of his debt to the party applying for it.

Where an application has been made to a Judge for such an order, and he has refused to grant it, and application is made to another Judge to grant it, either upon the same or different material, the Judge subsequently applied to should always be informed of every previous application that has been made for it. This is, however, more a matter of propriety than of legal right, and although a party so applying, and not informing the Judge applied to of every previous application, whether upon the same or different materials, would be greatly censurable; yet I do not think that his omission to do so would be ground for setting aside the order so granted, if the material upon which it was granted warranted the granting of it.

Very rigid rules have no doubt existed on the subject of subsequent applications after dismissal of prior ones for the same object, but I am inclined to think that applications for orders for attachment and to hold to bail are not within them, and a good deal that was said by the Court in *Dodgson v. Scott*, 2 Ex. 457, supports this view.

Having regard to modern ideas and modern legislation in matters of practice and procedure, such rules must now be applied only in the interests of and for the advancement of justice, and not in support of ancient technicality.

The cause of action is in my opinion sufficiently stated in the affidavits upon which the order for the attachment was granted.

The same particularity in stating the cause of action is not required when a Judge has to make an order for a writ of attachment or to hold to bail, as was required in an affidavit to hold to bail when no order of a Judge was required, nor the same particularity as is required when personal liberty is involved. See *Wakefield v. Bruce*, 5 P. R. 77.

[The learned Chief Justice continuing held with the plaintiffs upon the merits.]

FALCONBRIDGE. J., concurred.

Appeal dismissed, with costs.

RE JOHNSON V. THERRIEN : CADIEUX, GARNISHEE.

Prohibition — Division Court—Judgment against garnishee — Proof of amount due—49 Vic. ch. 15, sec. 12—Money paid into Court.

Held, reversing the decision of STREET, J., in Chambers, that the Judge of a Division Court has no jurisdiction to give judgment against a garnishee without proof of the amount owing by the garnishee to the judgment debtor, and for such a cause prohibition will lie.

There is nothing in the sub-section substituted by 49 Vic. ch. 15, sec. 12, for R. S. O. (1877) ch. 47, sec. 136, sub-sec. 2, which repeals the condition precedent in sec. 132 to the Judge's giving judgment against the garnishee.

Held, also, that, if necessary, the writ of prohibition should go to compel the re-payment to the garnishee of money paid by him into the Division Court.

[March 9, 1888.—*The Queen's Bench Division.*]

AN application by the garnishee for a writ of prohibition directed to the presiding Judge of the Fourth

Division Court of Prescott and Russell to restrain proceedings to enforce judgment against the applicant.

The garnishee was personally served with the summons, but failed to attend at the trial, and the Judge proceeded without any proof of the existence of any debt from the garnishee to the primary debtor, to give judgment against him for \$104, the amount owing to the primary creditor by the primary debtor.

The garnishee afterwards shewed that his failure to attend was owing to a misapprehension, and that he had a good defence upon the merits, but the Judge refused a new trial, and the garnishee appealed to the Court of Appeal, first paying the debt and costs and a further sum of \$20 ordered by the Judge into the Division Court, where the money remained till after the present application. The appeal was dismissed.

This application was made upon the ground that the Judge had no jurisdiction to give judgment against the garnishee without proof of the existence of a debt due by him, and upon other grounds not necessary to set out, and was argued in the first instance in Chambers before STREET, J., who held that by 49 Vic. ch. 15, sec. 12, sub-sec. 2, (O.), where no defence has been filed by the garnishee, the Judge may in his discretion give judgment against him without proof of the existence of any debt due from him to the primary debtor; and refused to interfere with the discretion exercised in this case.

The garnishee appealed from this decision, and the appeal was argued before a Divisional Court, composed of Armour, C. J., and Falconbridge, J., on the 13th February, 1888.

J. H. Ferguson for the appeal. The Judge of the Division Court had no right to proceed without taking some evidence: *In re Evans v. Sutton*, 8 P. R. 367. The question in this appeal is, has the Act of 1886 repealed or altered sec. 132 of the Division Courts Act, R. S. O. (1877) ch. 47? It does not do so in terms, and the inference that it does so is

not a fair one. The object the Legislature had in view was to extend the line of defence; the new Statute is an enabling one, not a curtailing one; it extends the right to plead in a certain way, and enables defences to be set up which could not before have been set up.

No one appeared contra.

Judgment was delivered on the 9th March, 1888.

ARMOUR, C. J.—The question involved turns wholly upon the construction to be placed upon R. S. O. ch. 47, sec. 132, and upon 49 Vic. ch. 15, sec. 12, repealing and substituting a new sub-section for R. S. O. ch. 47, sec. 136, sub-sec. 2.

Sec. 132 provides that “at the hearing of the summons, or at any adjourned hearing, on sufficient proof of the amount owing by the garnishee to the primary debtor *
* the Judge may give judgment against the garnishee for the amount so owing from him or sufficient thereof to satisfy the judgment.”

Under this section it is a condition precedent to the Judge giving judgment against the garnishee that “sufficient proof of the amount owing by the garnishee to the primary debtor” shall be given; and this is apparent not only from the words used but from the subject matter of the judgment, which is to be “for the amount so owing from him or sufficient thereof to satisfy the judgment;” and without proof of the amount so owing from him judgment cannot be given against him. Rule 56 of the Division Courts provides that “if the garnishee or primary debtor having been served does not appear on the return of such summons, judgment may be given against him by default.” But sufficient proof must be given of the amount owing from the garnishee to the primary debtor, in order that the Judge may give judgment against the garnishee for the amount so owing from him to the primary debtor, or sufficient thereof to satisfy the judgment.

The Judge, however, in this case gave judgment against the garnishee, without any proof whatever of the amount

owing by the garnishee to the primary debtor, for the amount of the judgment against the primary debtor.

I am of opinion that in so doing he exceeded his jurisdiction, and that prohibition will lie for such a cause: *Mayor of London v. Cox*, L. R. 2 E. & I. Appeals at pp. 275 and 276; *White v. Steele*, 12 C. B. N. S. 383; and *Lloyd's County Court Practice*, 8th ed. 208.

There is nothing, in my opinion, in the sub-section substituted by 49 Vic. ch. 15, sec. 12, for R. S. O. ch. 47, sec. 136, sub-sec. 2, which repeals, either by express words or by any necessary inference, the condition precedent to the Judge's giving judgment against the garnishee in sec. 132.

The words used in that sub-section, "and in the absence of any notice of defence or set-off from any primary debtor or garnishee, the Judge may in his discretion give judgment against such primary debtor or garnishee," do not, in my opinion, warrant the Judge in giving judgment against the garnishee except on sufficient proof of the amount owing by the garnishee to the primary debtor, for without this proof he cannot give judgment against the garnishee for the amount so owing from him, or sufficient thereof to satisfy the judgment.

I am of opinion, therefore, that the adjudication by the Judge of the County Court upon the garnishee summons in this case was without jurisdiction and void, and that all proceedings had upon the said adjudication were without jurisdiction and void.

In *FitzHerbert*, 46, it is laid down: "And so after judgment given, and execution awarded (where there is no jurisdiction) the party defendant shall have a writ of prohibition unto the bailiffs, or unto the sheriff or officer of the Court, that they do not execution; and if they have distrained the party to make satisfaction, that then they release the distress, and that they revoke what they have done therein."

It will not be necessary to issue the writ of prohibition, for, after this our judgment, the garnishee will be entitled to get back the money paid by him into Court, but if it

should become necessary the writ will issue according to the authority cited from *Fitz-Herbert*.

We could give no costs except against the Judge, and this it is not usual to do.

FALCONBRIDGE, J., concurred.

Appeal allowed and prohibition ordered.

ODELL V. CITY OF OTTAWA.

Discovery—Examination of servant of corporation.

Where a corporation was sued for negligence resulting in an accident, an order was made for the examination for discovery of the driver of the traction engine, which was the alleged cause of the accident.

[February 7, 1888.—*Armour, C. J.*]

AN appeal by the defendants from an order of one of the local Judges at Ottawa, allowing the plaintiff to examine one McElroy, a servant of the defendants, for discovery, before the trial.

The action was for damages for negligence—an accident having been caused by a traction engine of the defendants, driven by McElroy, and the plaintiff having been injured thereby.

Watson, for the appeal.

Aylesworth, contra, was not called on.

ARMOUR, C. J., dismissed the appeal, saying that in an action against a corporation for injury sustained by the plaintiff through the negligence of a servant of the corporation in the course of his employment, such servant can be examined for the purpose of discovery.

Appeal dismissed; costs in the cause.

WELLBANKS V. CONGER (2.)

Costs—Certificate for—Action for libel—Nominal damages—Cause for depriving successful party of costs.

Where, in an action for libel, the plaintiff obtained a verdict for twenty cents damages,

Held, that no certificate or order for full costs was necessary, and that the plaintiff could be deprived of such costs for good cause only.

Wilson v. Roberts, 11 P. R. 412, followed.

The Court cannot look behind or beyond the finding of the jury as to the right of a party to recover a verdict, and therefore the cause here alleged for depriving the plaintiff of costs, viz., that he was really not entitled to recover, as shewn by the result of a trial of substantially the same issues before another forum, could not be regarded.

[March 10, 1888.—*The Common Pleas Division.*]

A motion by the plaintiff for a certificate for full costs under the circumstances set forth in the judgment, was argued before a Divisional Court composed of Galt, C.J., and Rose, J., on the 6th February, 1888.

Ritchie, Q. C., for the plaintiff.

W. H. P. Clement, contra.

ROSE, J.—For reasons set out in our former judgment herein, *ante* p. 354, we directed judgment to be entered for the plaintiff, with costs. Mr. Ritchie now applies for a certificate or order for costs according to the High Court scale. To this Mr. Clement shews cause, desiring the Court to take such action as will prevent the plaintiff having his costs according to such scale, and will enable the defendant to set off costs.

The action was one of libel. The jury found for the plaintiff with twenty cents damages. Judgment was not entered at the trial owing to the learned Judge desiring to consider the question of costs, and his death occurring before he arrived at a decision.

There was a plea of justification, and the case went to the jury with a charge rather favourable to the defendant.

The defamatory words charged bribery during an election contest, and Mr. Clement asked us to consider the result of an election trial arising out of the same contest, where he says the plaintiff was, by the learned Judge presiding at such trial, found guilty of the offence charged by the defendant, and for charging which this action was brought.

It may be well to ascertain what is the law respecting costs of such actions as the present.

It was decided in *Garnett v. Bradley*, 3 App. Cas. 944 that by the Judicature Act the prior statutes respecting costs were repealed. There are certain exceptions; see *Arscott v. Lilley*, 14 A. R. 283.

We must therefore look to the Judicature Act.

Rule 428 provides "that where any action or issue is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, for good cause shewn, the Judge before whom such action or issue is tried, or the Court, shall otherwise order."

Under such rule, therefore, the plaintiff would be entitled to costs without any order, and can be deprived of them for good cause only.

It is argued, however, that rule 428 *a.*, passed on the 28th January, 1882, deprives the plaintiff of costs without a certificate. It is—"In case of trial by jury, and the Judge or Court makes no order respecting the costs, under rule 428, *the taxation of costs* shall be under such *scale of allowance* only as would have been applicable before the passing of the Judicature Act; and the event shall in such case be to *recover costs according to such scale*, subject to such rights of set-off as to costs as apply under the C. L. P. Act."

We are further referred to sec. 345 of the C. L. P. Act, ch. 50 R. S. O. (1877), whereby it is provided that in any action of trespass, or trespass on the case, where the plaintiff recovers less than \$8 by the verdict of a jury he shall have *no* costs without a certificate; and the defendant shall be entitled to set off his costs against the verdict and recover judgment for the balance.

It would seem manifest that rule 428 *a.* cannot refer to

such section, as the language would be quite inapplicable, for there can be no *taxation* under a *scale of allowance* when the plaintiff is entitled to *no costs* whatever.

I am confirmed in this view by reference to the case of *Wilson v. Roberts*, 11 P. R. 412, the decision of the full Court, Queen's Bench Division, composed of Wilson, C. J., and Armour and O'Connor, JJ., where, without any reference to rule 428*a*., it was held that the plaintiff in an action of libel or slander with a verdict of \$1 in his favor, was entitled to tax full costs without a certificate.

I therefore conclude that in this case the plaintiff may have his full costs without any certificate or order, unless for good cause shewn we may deprive him of them.

The cause alleged is that on the evidence he was really not entitled to recover, and that the finding at the subsequent trial shews this. In my opinion we cannot look behind or beyond the finding of the jury as to the right of the plaintiff to recover the verdict he obtained. It was a question of veracity and credibility, and the jury chose to accept his statement of the facts. I think we may not look either at the evidence at the election trial, or at its result. If on the same evidence, given in the same manner, as to which we cannot possibly be advised, the jury at the first trial and the Judge at the second trial have arrived at opposite conclusions, the plaintiff may well say that he is as much entitled to rely upon the finding of twelve judges of fact as the defendant to rely upon the finding of only one, however able or experienced.

We cannot determine between them.

The defendant saw fit to justify, and the defence has not been sustained. I am of the opinion that the application to deprive the plaintiff of costs must fail, as no good cause has been shewn.

There was, in my view, no necessity for this motion by the plaintiff. He had as much without it as he has with it, and he should have no costs of the motion. And as the defendant has been unsuccessful in his endeavor to deprive the defendant of his costs, neither is he entitled to any costs of the motion. We therefore make no order.

Reference may be had on the question of costs to the 2nd ed. of *Odgers* on Libel and Slander (366) Blackstone series, p. 277.

GALT, C. J., concurred.

No order made.

RE MCLEOD V. EMIGH.

Prohibition—Division Court—Married woman—Examination and commitment as judgment debtor—Indorsement on judgment summons.

A judgment against a married woman by virtue of the Married Women's Property Act creates no general personal liability, but merely charges her separate estate; and the provisions of sec. 117 of the Division Courts Act, R. S. O. (1877) ch. 47, as amended by 43 Vic. ch. 8, touching the examination of judgment debtors, are not applicable to a married woman against whom judgment has been obtained in the Division Court, and, even if liable to be examined, such a person is not liable to be committed to gaol under sec. 182.

Metropolitan L. & S. Co. v. Mara, 8 P. R. 355, distinguished.

A creditor's rights against a married woman debtor are determined by the statute at the time the debt is contracted, and cannot be enlarged by the debtor subsequently becoming a widow.

Helu, also, following *Regina v. The Judge of the Brompton County Court*, 18 Q. B. D. 213, that the Judge's endorsement on the judgment summons was the order upon such summons, and that a subsequent order was illegal.

[March 10, 1888.—*The Common Pleas Division.*]

MOTION by the defendant for prohibition to the Judge of the County Court of Oxford and to the clerk and bailiff of the First Division Court of Oxford, and to the plaintiff; referred by Rose, J. to the Divisional Court. The facts appear in the judgment.

The motion was argued before Galt, C. J., Rose, J., and MacMahon, J., on the 22nd and 23rd of February, 1888.

Aylesworth, for the motion.

A. M. Grier, contra.

ROSE, J.—The judgment herein was against a married woman. It was general in form and not as directed in *Scott v. Morley*, 20 Q. B. D. at p. 132, made “payable out of her separate property * * and not otherwise.” In *Scott v. Morley* there are further provisions which are not necessary to be considered in this case.

It is clear that a judgment against a married woman under the statute creates no general personal liability, but merely charges her separate estate.

In the language of Cotton, L. J., in *Ex p. Jones*, in the Court of Appeal, 12 Ch. D., at p. 490: “It is not the woman, as a woman, who becomes a debtor, but her engagement has made that particular part of her property which is settled to her separate use a debtor, and liable to satisfy the engagement.” See also *Pike v. Fitzgibbon*, 17 Ch. D. 454; *Picard v. Hine*, L. R. 5 Ch. App. 274.

Judgment was obtained on the 22nd February, 1886, and her husband died on the 1st March following. On the 21st July, 1887, a judgment summons was issued returnable on the 6th September, and she not appearing was committed for twenty days. The order of the Judge endorsed upon the summons was, “Ordered to be committed twenty days for not appearing.

September 16, 1887.

ALEX. FINKLE.”

Her non-appearance having been explained, she was allowed to appear on the 2nd November following, the first order being discharged, as it is said; when she was examined before the learned County Court Judge, and upon the close of the examination he endorsed upon the summons, “Order for committal twenty days.

November 2, 1887.

ALEX. FINKLE.”

Counsel appeared and objected that the defendant was not liable to be examined or committed as a judgment debtor.

It is said that at the time of pronouncing the order no reasons were assigned, save that the Judge said that it was made under sub-sec. 3 of sec. 182 of the Division Courts Act, R. S. O. ch. 47, (1877.)

It is further stated on affidavit, that on the 8th November an order signed by the learned Judge was handed to the clerk of the Court, reciting the various steps taken in the matter, and that on such examination the defendant did not "make answer touching such matters to my satisfaction," and further, that from her examination, and the examination of papers and documents produced, it appeared to the Judge that she had made or caused to be made a gift, delivery, or transfer of certain of her property with intent to defraud her creditors, or some of them, "and directing her to be committed to gaol for twenty days."

On the 10th November a warrant to enforce the order was issued, and this motion is to prohibit the execution of the warrant.

It is urged that the defendant is not a debtor liable to pay the debt, and that there was no jurisdiction to examine her or commit her to custody, and in any event that the second order is illegal while the first is outstanding.

The section of the Division Courts Act, sec. 177 of R. S. O. ch. 47, provides that "Any party having an unsatisfied judgment or order in the Division Court, for the payment of any debt * * may procure from the Court * * a summons" &c. On such summons an examination may be held, and in fact a separate trial—as witnesses may be examined. By sec. 182 it is enacted that "If the party so summoned—

1. Does not attend * * or allege a sufficient reason * * or

2. * * Refuses to be sworn * * or

3. If he does not make answer touching the same to the satisfaction of the Judge; or

4. Sub-sec. c. Has made or caused to be made any gift, delivery, or transfer of any property * * * the Judge may, if he thinks fit, order such party to be committed to the common gaol * * for any period not exceeding forty days."

By sec. 186, upon payment of debt and costs the defendant is entitled as of right to be discharged.

By sec. 188, upon the conclusion of the trial the Judge

may proceed at once with the examination, without summons, and may make a like order for committal.

By sec. 189 the debt is declared not to be extinguished by the imprisonment.

These sections are similar to, if not in the same words as those found in 8 & 9 Vic. ch. 95, which were passed upon by the Court in *Ex p. Dakins*, 16 C. B. 77, in which it was held that the process was "limited execution," "in the nature of a *ca. sa*," and not process for contempt nor for punishment only, "its object being to get the money by coercing the person of the debtor;" and the provision for discharge on payment of the debt and costs clearly distinguishes this case from *Metropolitan Loan and Savings Co. v. Mara*, 8 P. R. 355, and renders it unnecessary for us to say whether, in the light of the authorities to which we have been referred, we would feel bound to follow that decision.

By an amendment of sec. 177 by sec. 59 of ch. 8, 43 Vic. (O.), it is necessary before any such order for examination takes place that "the plaintiff * * shall make and file * * an affidavit stating (1) * * (2) That the deponent believes that the defendant sought to be examined is able to pay the amount due * * "

It is clear from *Scott v. Morley* that a *capias* could not issue against a married woman for default in payment of a debt recovered against her by virtue of the Married Women's Act, nor can any proceedings be taken which have the effect of rendering her personally liable. See also *In re Ryley*, 15 Q. B. D. 329.

Ex p. Jones, supra, shews that she is not a "debtor" within the meaning of the Bankrupt Act.

In my opinion the provisions of sec. 177, as amended by 43 Vic. ch. 8, are not applicable to a married woman against whom judgment has been obtained by virtue of the Married Women's Act, but are applicable only where there is a personal liability to pay.

And (2) that if liable to be examined, a married woman in such a case is not liable to be committed to gaol under such and the following sections.

I am moreover of the opinion, upon the authority of *Regina v. The Judge of the Brompton County Court*, 18 Q. B. D. 213, that the endorsement on the summons was the order, and that the order signed upon which the warrant issued was illegal—the first order being in force.

See also *Horsnail v. Bruce*, L. R. 8 C. P. 378; *Bullen v. Moodie*, 13 C. P. 126; *Ponton v. Bullen*, 2 E. & A. 379; *Davies v. Fletcher*, 2 E. & B. 271.

The form of the first order was attacked if it was relied upon as supporting the warrant, but for the reasons given we do not feel called upon to further consider it.

As to the particularity required, *Quackenbush v. Snider*, 13 C. P. 196, was referred to.

The fact that after judgment was obtained the defendant became a widow cannot enlarge the plaintiff's rights, as argued by Mr. Grier. They were determined by the judgment or more properly by the statute at the time the debt was contracted.

I think the order must go :

1. Because the defendant was not liable to be examined under the provisions of sec. 177, as amended.

2. Or if so, that she was not liable to be committed under such section and those following.

3. That the second order was illegal, the first being in force.

As the plaintiff came into Court from Chambers at my request, that I might be able with the other members of the Court, if necessary, to review the case of *Metropolitan Loan and Savings Co. v. Mara*, I think the costs should be only as if the motion had been made in Chambers.

The order will go with such costs. There will be no costs against the Judge of the County Court.

GALT, C. J., and MACMAHON, J., concurred.

Prohibition ordered.

FERGUSON V. KENNEY.

Parties—Attacking fraudulent conveyance—Assignee for creditors under 48 Vic. ch. 26, (O.)—Execution creditors.

In an action to set aside a conveyance by K. to his wife as fraudulent, brought by the assignee for the benefit of creditors of K., in pursuance of the powers conferred upon such assignee by 48 Vic. ch. 26, sec. 7, (O.), an order was made adding certain execution creditors of K. as parties plaintiff, upon the motion of the plaintiff, who desired that the action should not be defeated, if in other litigation pending it should be determined that the Act was *ultra vires*.

[March 10, 1888.—*The Common Pleas Division.*]

APPEAL by the defendant from an order of Armour, C. J., in Chambers, dismissing an appeal from an order of the Master in Chambers adding the firm of Tait, Burch, & Co. as parties plaintiff.

The appeal was argued before a Divisional Court, composed of Galt, C. J., Rose, J., and MacMahon, J., on the 18th February, 1888.

A. C. Galt, for the appeal.

Geo. Kerr, contra.

ROSE, J.—This action was brought by the assignee for the benefit of creditors of one John Henry Kenney, husband of the defendant Margaret J. A. Kenney, to set aside a conveyance alleged to have been made by the husband to the wife in fraud of creditors.

The action is brought in pursuance of the exclusive powers conferred upon such assignee by 48 Vic. ch. 26, sec. 7, (O.)

The statement of claim sets out that Kenney at the date of the conveyance was indebted to, amongst others, the firm of Tait, Burch, & Co.

The plaintiff, having in view the cases now standing for judgment in the Court of Appeal for this Province, raising the question of the power of the Local Legislature to pass the Act 48 Vic., and desiring that his action should not be

defeated if it should be held that the Act was *ultra vires*, and hence that he had no *locus standi* in Court, applied to the Master in Chambers for an order adding Tait, Burch, & Co. as parties plaintiff, they being judgment creditors of Kenney.

The learned Master made the order, which was affirmed on appeal by the learned Chief Justice of the Queen's Bench Division. From that order this appeal was taken.

It was objected by the defendant that the rights of the plaintiff under the statute would be different from those of an execution creditor apart from the statute, and that the defendant would be put to additional expense by reason of the execution creditors being added as parties. That may possibly be; but the real issue to be determined in this action is whether or not the conveyance is fraudulent and void as against creditors. If in the suit by Ferguson alone it should be held that he had a right to recover, the proceeds would go to the creditors—Tait, Burch, & Co. taking their share. They are therefore beneficially interested in the trial of such an issue, and practically beneficial plaintiffs. If it should be held that the Act was *ultra vires*, and so that the assignee had no right to sue, the loss would fall upon Tait, Burch, & Co., amongst others. If they are added as plaintiffs, and it is held that though the assignee had no right to sue, the deed must be declared fraudulent and void as against creditors, the added plaintiffs would reap a benefit.

The plaintiff's solicitor's idea is, that if the Act is declared *ultra vires*, the assignment will still be effective at common law, and that the impeached conveyance being set aside, the assignee will have the right to sell the property for the benefit of the creditors.

If the Act is *intra vires*, sec. 7 declares that, subject to a named exception, "the assignee shall have the *exclusive* right of suing for the rescission of agreements, deeds, and instruments, or other transactions made or entered into in fraud of creditors," &c.

If the conveyance has been made in fraud of creditors,

it certainly would not be right to prevent the creditors reaching it because of an uncertainty in the law, against which the Courts can well protect them.

We cannot see that any error appears in the judgments appealed from.

In order to avoid any difficulty as to the *status* of the added plaintiffs, in the event of the Act being declared *ultra vires*, and to secure to the general body of creditors the benefit of the litigation if it prove successful, it must be made to appear in the amended statement of claim that they sue not only on their own behalf but also on behalf of all the creditors. If it is made to appear at the trial that the defendants ought not in justice to bear any or all of the increased costs, if any, occasioned by the amendment, such order can be made as will be just.

This Court in *Thorne v. Williams*, 13 O.R. at p. 580, dealt with the propriety of making amendments, adding plaintiffs, where the right to recover was in either of two, but a doubt existed as to the proper plaintiff.

We think the defendant should have been content with the judgment appealed from, and that this motion must be dismissed, with costs to be in the cause to the plaintiffs in any event.

GALT, C. J., and MACMAHON, J., concurred.

Appeal dismissed.

RUSSELL v. MACDONALD.

Evidence—Examination of witness on pending motion—Production of partnership books.

Upon a pending motion to restrain the defendant from receiving any moneys due under a certain contract, and to appoint the plaintiff receiver of such moneys, an affidavit of the defendant's partner was filed in answer, and he was cross-examined upon it by the plaintiff; he was unable to answer a number of questions with reference to the defendant's position in regard to the partnership, because he had not with him the books of the partnership, from which alone the facts could be ascertained, and he refused to produce such books.

Held, that he should be ordered to attend for further examination, and to produce the books required, at his own expense.

In re Emma Silver Mining Co., L. R. 10 Ch. 194, followed.

[March 12, 1888.—*MacMahon, J.*]

THE plaintiff, a judgment creditor of the defendant, served upon the solicitor of the defendant a notice of motion for an injunction restraining the defendant from receiving any of the moneys due to him from the Government of Canada in respect of his interest in the contract of A. F. Manning & Co. for the construction of the Tay Canal (in which contract the defendant had a one-fourth interest), and for an order appointing the plaintiff, William Augustus Russell, receiver, without emolument, of so much of the moneys coming to the defendant as would satisfy the plaintiff's judgment.

On the return of the motion, and in opposition thereto, A. F. Manning, the defendant's partner, filed an affidavit as to the position of the partnership affairs. He was cross-examined before Mr. Bruce, a special examiner, on his affidavit, but was unable to answer a number of the questions because he had not the firm's books, which could alone explain the defendant's position in regard to the partnership assets and liabilities. Manning refused to produce the firm's books, from which alone the facts could be ascertained, and by means of which any benefit could be derived from his cross-examination.

The examiner ruled that the books referred to in Mr.

Manning's examination should be produced, but he refused to produce them.

A motion was then made to compel Manning to appear for further examination at his own expense, and that he be ordered to produce such books as were referred to as necessary to give the information as to the defendant's interest in the firm.

The motion was argued before MacMahon, J., in Court, on the 10th February, 1888.

Judgment was delivered on the 12th March, 1888.

H. W. Mickle, for the motion.

Bain, Q.C., contra.

MACMAHON, J.—It was said there was no authority for this motion: but *In re Emma Silver Mining Co.*, L. R. 10 Ch. 194, where, on the presentation of a petition for winding up, the secretary of the company filed an affidavit in opposition to the petition and was cross-examined before a special examiner, and on his cross-examination was called on to produce the books of the company, which he refused to do; Malins, V. C., made an order for the production of the books and papers which they had had notice to produce, and the Court of Appeal affirmed the order so made.

That case is near enough in principle (although the secretary of the company in that case was acting for and on behalf of the company in making the affidavit) as a foundation for the order asked for here. But even without the authority which that case affords, I would have felt compelled to establish a precedent.

Here the partner of the defendant makes an affidavit in order to stay the Court in granting the relief which the plaintiff asks, which will enable him to reap the fruits of his judgment, and when cross-examined on his affidavit says, "I don't know this, nor can I speak about that with certainty, without having the firm's books, and these I refuse to produce."

I order Mr. Manning to attend for further examination before Mr. Bruce, and that he make the production of the books required before the special examiner, at his own expense.

The question as to the receivership can be mentioned after the examination of Manning is concluded.

GUESS V. PERRY.

Writ of summons—Amending indorsement—Re-serving the writ.

The writ of summons was specially indorsed with a money demand, besides which the indorsement claimed damages for waste, &c.

The plaintiff obtained an *ex parte* order amending the indorsement by striking out the claim for damages.

Held, that judgment by default could not be entered after the amendment without re-serving the writ on the defendant. —

[March 12, 1888.—*MacMahon, J.*]

THE plaintiff's writ of summons was specially indorsed with a claim for \$304.22, the amount of an account rendered, and interest, and there was in addition a claim for damages for waste, and for damages to property owned by the plaintiff and occupied by the defendant.

The defendant was served with a copy of the writ on 28th November, 1887, and not having appeared, the plaintiff on the 19th December applied to the local Judge at Kingston and obtained an *ex parte* order amending the indorsement on the writ by striking out the claim "for damages for waste," &c., and on the same day, without re-serving the writ as amended, signed final judgment for the amount for which the writ was specially indorsed.

On 24th December the defendant moved before the local Judge at Kingston for an order setting aside the judgment and for leave to appear, and on the 1st February an order was made by the local Judge that upon payment of the costs of entering judgment and of

the application within ten days by the defendant, the judgment should be set aside and the defendant be at liberty to defend by entering an appearance.

The defendant appealed from so much of the order as required him to pay the costs of entering the judgment and of the application to set the judgment aside, and the appeal was argued before MacMahon, J., in Chambers, on the 17th February, 1888.

C. R. W. Biggar, for the appeal.

James Smith, contra.

Judgment was delivered on the 12th March, 1888.

MACMAHON, J.—Judgment could not be entered after amendment without re-serving the writ. In *Bryans v. Hughes*, Ir. Rep. 14 C. L. 62, an amendment to an indorsement on a writ was made in Chambers; and notwithstanding the defendant was represented on the motion when the amendment was ordered to be made, yet judgment having been entered without re-serving the writ with the amended indorsement, the judgment was set aside with costs.

The order of the local Judge will stand as to that part setting aside the plaintiff's judgment, but will be varied by striking out that portion ordering the defendant to pay the costs of entering the judgment and the costs of the application setting the same aside.

There will be no costs of this appeal.

KINCAID V. KINCAID.

Receiver by way of equitable execution—Motion for in Court or Chambers—Costs—O. J. Act, sec. 17, sub-sec. 8, Rule 399—Amount of judgment—Other remedies.

A motion for the appointment of a receiver by way of equitable execution is properly made in Court, notwithstanding the language of the O. J. Act, sec. 17, sub-sec. 8, and rule 399, and the applicant will not be restricted to the costs of a Chambers motion.

A judgment for \$212.60 is not too small to justify the judgment creditor in moving for a receiver.

It is no answer to such a motion that the judgment creditor could probably make the amount of his judgment out of the defendants by the sale under common law process of other property of the defendant than that sought to be reached by the appointment of a receiver.

[March 13, 1888.—*Ferguson, J.*]

THE plaintiff in an alimony action had obtained judgment against her husband, the defendant, for payment of a quarterly sum for alimony, together with her costs of action, which were taxed at \$212.60. The defendant paid the quarterly allowance for alimony, but failed to pay the taxed costs. The plaintiff moved before Ferguson, J., sitting in Court, for an order appointing her a receiver without security or salary, to receive the residuary share or interest which the defendant was entitled to under the will of his late father, until the amount due to the plaintiff for her said costs, together with her costs of and incidental to the motion, should be satisfied.

It appeared from the affidavits filed that, apart from the funds which the plaintiff was seeking to reach by means of the appointment of a receiver, the defendant was the owner of real estate in this Province of greater value than the amount of the plaintiff's claim for costs, and that the plaintiff had issued a *fi. fa.* lands and placed the same in the hands of the sheriff of the county in which such lands lay, and that the writ was alive in the hands of the sheriff at the time of the making of this application.

E. H. Britton, in support of the motion cited *Bryant v. Bull*, 10 Ch. D. 153.

A. H. Marsh shewed cause and contended that the motion should fail because the amount of the judgment debt was too small to justify the plaintiff in incurring the costs of the appointment of a receiver: *I. v. K., W. N.*, 1884, p. 63; and because the Court should not appoint a receiver by way of equitable execution until after the judgment creditor has exhausted his legal remedies and has been unable to thereby satisfy his claim: *Exp. Evans*, 13 Ch. D. at pp. 257, 258; *Wilson's Judicature Acts*, 6th ed. p. 347.

He further contended that the plaintiff should have adopted less expensive proceedings, by way of garnishment: *Stuart v. Gough*, 15 O. R. 66; and that in any event the plaintiff should get only the costs of a Chambers application, as Rule 399 authorizes the making in Chambers of all motions for the appointment of receivers under sec. 17, sub-sec. 8, of the Judicature Act.

FERGUSON, J.—I cannot say that this motion is improperly made in Court; if I were to hold that it is, then it would be necessary to hold that all motions for injunction or for a mandamus should be made in Chambers, for sec. 17, sub-sec. 8, of the Judicature Act and Rule 399 apply as well to such motions as to this present motion, and it is undoubtedly the usual practice to move in Court for orders for mandamus and injunction.

Neither can I say that the plaintiff should be limited to the costs of a garnishing application, for, although I think that she would have been able to reach the funds in question by attachment, yet I cannot say that her remedy by attachment is of so plain and clear a character that she should be deprived of any of her costs by reason of her having failed to seek that remedy rather than the one which she now seeks.

I think that the plaintiff is entitled to an order for the appointment of herself as receiver of the fund in question, as one of the now usual and ordinary methods of execution, and it does not lie in the mouth of the defendant to com-

plain that she has not exhausted all of her other remedies, for it is her right to recover the amount of her claim by that method which will enable her to procure payment thereof in the most speedy manner authorized by the practice of the Court.

McKAY V. ATHERTON ET AL.

Judgment debtor—Committal for unsatisfactory answers.

The defendant, a widow, upon her examination as a judgment debtor admitted having lent her brother \$300, and having in her house at the time of the examination \$100, which she refused to hand over to apply on the judgment, because she had no other property with which to support herself and three children.

The Judge to whom an application to commit the defendant for unsatisfactory answers was made, held that the facts of the case did not bring it within the decisions in *Metropolitan L. & S. Co. v. Mara*, 8 P. R. 355, and *Crooks v. Stroud*, 10 P. R. 131, and without laying down any rule, declined, in the exercise of his discretion, to order a committal without further information than was afforded by the examination.

[March 22, 1888.—*Rose, J.*]

A motion by the plaintiff to commit the defendant Louisa McKay, a widow, for unsatisfactory answers upon her examination as a judgment debtor. She was not represented on the motion and it was said she had no solicitor.

J. B. Clarke, for the motion.

ROSE, J.—The defendant's examination is put in, from which it appears that the judgment is for \$120. No explanation is given as to how a judgment for so small a sum has been obtained in this Court. It further appears that she received \$500 from the United Workmen—insurance money payable upon the death of her husband—that of this she has spent about \$160 in purchasing clothing for herself and children—has lent her brother

one John McDonald, about \$300, and had \$100 in the house at the time of the examination. It is clear of course that if she had \$100 in the house and had spent \$160 in purchasing clothing, she cannot have lent her brother more than \$240.

It also appears that her chattels are mortgaged to one Hugh Thompson.

She says that she intends to pay the judgment in time, but will not pay it now because she has nothing to live on, or as she puts it in another part of her examination: "I refuse to hand over the cash I have, to pay this judgment at present, as I have my three children to support. I have no other property except what I have mentioned."

It appears from the examination that \$1,500, life assurance money, was paid to the children by the United Workmen, but it does not appear whether or not it has been invested, or whether or not now available for their support and maintenance.

I have nothing before me but the examination, and assuming that the woman is telling the truth, I am asked to commit her to gaol because she will not apply in payment of this judgment all the money in her possession, although by so doing she will leave herself without any means of support. I am not prepared to lay down any hard and fast rule as to when a refusal to hand over money in a debtor's possession will amount to an unsatisfactory answer within the meaning of the statute. In this case, however, in the exercise of the discretion vested in me, I decline, on this state of facts, without further information, to make the order asked for.

I have examined the cases of *Metropolitan L. & S. Co. v. Mara*, 8 P. R. 355, and *Crooks v. Stroud*, 10 P. R. 131. The facts do not bring this case within either of those decisions.

The refusal of this application will be without prejudice to renewing it on further material, if the plaintiff be so advised.

As no one shewed cause, there will be no costs.

It would be better if any further motion be made, that if any solicitors acted for her at any prior stage of the proceedings, they should be served. I observe that the notice of motion is addressed to a firm of solicitors, but not served upon them, and the affidavit of service states that "she has no solicitors acting for her herein."

PEARSON V. ESSERY.

Contempt of court—Attachment—Judgment debtor—Examination of—Married woman—Judgment for costs.

Held, that the defendant was liable to committal for contempt in not attending to be examined as a judgment debtor, although she was a married woman and the judgment was one for costs. Her imprisonment under such committal would not be an imprisonment for non-payment of costs.

[March 20, 1888.—*Ferguson, J.*]

MOTION by the plaintiff to commit the defendant for her contempt in not attending for examination as a judgment debtor, upon proper service of appointment and subpoena. The plaintiff's judgment was for the recovery of land and for payment of costs, and the defendant was a married woman.

F. E. Hodgins, for the plaintiff, referred to *Metropolitan L. & S. Co. v. Maru*, 8 P. R. 355; *Re M.*, 46 L. J. Ch. 24, 25; *Campbell v. Martin*, 11 P. R. 509.

No one appeared on behalf of the defendant.

FERGUSON, J.—I am of the opinion that the defendant, though a married woman, is liable to attachment for the contempt. I am also of the opinion that her attachment for the contempt will not be, if it in fact takes place, an imprisonment for non-payment of costs, although the examination upon the judgment is for the purpose of recovering a sum of costs on the judgment. She should have attended for examination. She offers no excuse for not attending and is in contempt. The order may go.

Order accordingly.

HURST ET AL. V. BARBER ET AL.

Discovery—Rule 235—Preliminary issue.

In an action against the defendants, as executors and residuary legatees under a will, for a declaration that the will should not be admitted to probate on the ground that it was altered after execution, and for administration and partition :

Held, that the case came within rule 235, and until the plaintiffs established the alteration charged, they were not entitled to discovery of instruments affecting the estate of the testator.

[March 19, 1888.—*Boyd*, C.]

THE plaintiffs were legatees under a will, and brought this action to have it declared that because of the interlineation of the word “between” in a certain part of the will it should not be admitted to probate ; and for administration and partition of the estate. The effect of introducing the word “between” was to leave the residuary estate to be divided between the two executors, who were the defendants. The plaintiffs charged that the will was altered after it was signed by the testator, who died on the 7th January, 1888.

The Master in Chambers made an order upon the application of the plaintiffs directing the production by the defendants of the mortgages and other securities and books of the testator which came to their hands as executors.

The defendants appealed from this order, and the appeal was argued before *Boyd*, C., in Chambers, on the 19th March, 1888.

Hoyles, for the defendants. The only or at all events the preliminary issue is whether the word “between” in the will should be struck out, and to this these documents cannot be relevant. That is the one essential question and till it is determined there should be no scrutiny into the estate ; Rule 235, O. J. Act ; *MacGregor v. McDonald*, 11 P. R. 386 ; *Bray* on Discovery, p. 24 ; *Parker v. Wells*, 18 Ch. D. 477 ; *Re Leigh*, 6 Ch. D. 256. The plaintiffs are

not entitled to administration or partition now; a year in one case and six months in the other must elapse from testator's death: *Grant v. Grant*, 9 P. R. 211.

Bain, Q.C., contra. The executors if defeated would be liable to have the estate taken out of their hands. What are the plaintiffs' rights as to the will? They say it is not the will of the testator; they desire to know the extent of the estate and what passes to the executors under the residuary devise. It is material to know the amount and character of the estate. The general rule as to discovery is laid down in *Chichester v. Donegall*, L. R. 5 Ch. 497.

Judgment was delivered at the close of the argument.

BOYD, C.—The case is within Rule 235 of the Judicature Act. The right to discovery depends upon whether the plaintiffs shall make good what they claim; I do not see how discovery of instruments affecting property which the testator had can help the plaintiffs to shew that the will was altered after execution. The Courts in England have passed upon this question: the remarks of Bowen, L. J., in *Leitch v. Abbott*, 31 Ch. D., at pp. 377-9; and of Cotton, L. J., in *Fennessy v. Clark*, 32 Sol. J. 74, may be referred to. Until the plaintiffs establish their right, the application for discovery is premature. The appeal is allowed; costs to defendants in any event.

ADAMSON V ADAMSON ET AL.

Jury notice—Equitable issues—C. L. P. Act, sec. 257—Disagreement of jury—New trial.

Where equitable issues are raised a jury is not of right but of grace under sec. 257 of the C. L. P. Act.

And where, in an action, brought under an order of the Court made in a former action, to try the plaintiff's right as against the now defendants to the possession of certain land recovered in that action, equitable issues were raised, and the case had been once tried before a jury, who had disagreed:

Held, that an order striking out the jury notice was properly made.

[March 19, 1888.—*Boyd*, C.]

THIS was an action brought to try the plaintiff's right to certain land, pursuant to an order made by Boyd, C., in a former suit of *Adamson v. Adamson*. The plaintiff was awarded possession of the same land against the defendant in that suit, but the sheriff was unable to execute a writ of *hab. fac. poss.* directed to him, by reason of the present defendants being in possession, and upon his application the order in the former suit was made, and this action brought under it.

Upon an application to change the place of trial it was determined by the Chancery Divisional Court that this was not an action of ejectment.

The case was tried before Street, J., and a jury at the Toronto Winter Assizes, 1888, when the jury disagreed as to some of the questions submitted. At the opening of the case application was made to the trial Judge to dispense with the jury, but he refused to do so.

After the trial a motion was made to the Chancery Divisional Court to enter judgment for the plaintiff upon the findings as to which the jury agreed. This motion was refused, and the case sent back for a new trial without prejudice to any motion to strike out the jury notice.

The plaintiff applied to the Master in Chambers for an order striking out the jury notice on the ground that equitable issues were raised by the pleadings.

The questions raised were, whether the defendants had acquired title by possession; as to the proper construction of a trust deed under which both the plaintiff and defendants claimed; and as to the claim of the defendants for rents and profits received by the plaintiff as trustee for them.

The Master in Chambers made the order striking out the jury notice, from which the defendants appealed. The appeal was argued before Boyd, C., in Chambers, 19th March, 1888.

Osler, Q.C., for the appeal. The question of the construction of the trust deed arises only after the question of fact as to possession is passed on by a jury; the question is one of the nature of possession and is proper to be submitted to a jury; the issue also involves the question of the credibility of the witnesses; the main question is one of fact and should be tried by a jury: *Temperance Colonization Society v. Evans*, 12 P. R. 48, 379; *West v. White*, 4 Ch. D., at p. 634; *Re Martin*, 20 Ch. D., at p. 370. Because one jury has disagreed, the case should not be taken from another jury.

J. MacLennan, Q.C., contra. The disagreement of the jury is a sufficient reason to support the Master's decision; but besides that, this is a case in which equitable issues are raised by the pleadings, and such a case is under secs. 257 and 258 of the C. L. P. Act to be tried without a jury. These sections are made applicable by sec. 45 of the O. J. Act. The question for trial is a single one—whether the plaintiff is to recover this property or not. If authority is needed, *Farran v. Hunter*, 12 P. R. 324, and *Fraser v. Johnston*, 12 P. R. 113, are directly in point.

Osler, in reply, referred to *Conmee v. Canadian Pacific R. W. Co.*, 12 A. R. 744; and also contended that the matter was *res judicata* by the decision of the trial Judge to retain the jury.

Judgment was delivered at the end of the argument.

BOYD, C.—The rule is not to interfere unless the order appealed from is clearly wrong; here I think the Master was right and the jury notice properly struck out. This is a peculiar case; it is a proceeding at the close of a lengthened litigation—in effect, a sort of interpleader *quoad* this land. The full Court were of opinion that it is not an action of ejectment; it is a proceeding instituted by the direction of the Court to try a question arising out of a previous action. Besides these considerations, there are undoubtedly equitable issues raised. It cannot be said that either party would have the right to a jury; where there are equitable issues a jury is not of right but of grace under sec. 257 of the C. L. P. Act; so that a jury should not have been claimed in the first instance. That mode of trial has been attempted, and it has failed; another disagreement will not improbably be the result of a new trial with a jury. There having been one trial by jury, and there being no inherent right to a jury, the case should not go down again in that way. The Court desires to see its order for the determination of this question by the trial of an action, obeyed as speedily as possible by a decision one way or the other. The order of the Master will be affirmed; costs to the plaintiff in any event.

NOTE.—Application was made for leave to carry this matter to the Court of Appeal, which being refused by the Chancellor, another application for leave was made to the Court of Appeal, which was also refused.

ARCHER V. SEVERN.

*Security for costs—Appeal to Supreme Court of Canada—Amount—
R. S. C. ch. 135, sec. 46.*

The Court has no discretion to increase the amount of security on appeal to the Supreme Court of Canada, fixed by R. S. C. ch. 135, sec. 46, at \$500, because of the number of respondents.

[April 5, 1888.—Osler, J. A.]

THE executors of John Severn, desiring to appeal to the Supreme Court of Canada from the judgment of the Court of Appeal pronounced on the 6th March, 1888, gave security to the amount of \$500, and now applied under sec. 46 of the Supreme and Exchequer Courts Act, R. S. C. ch. 125, to have the appeal allowed.

Snelling, Walter Barwick, and W. M. Douglas, for three respondents, all in different interests, and represented by different solicitors, objected that \$500 was not sufficient security for the costs of the respondents; referring to *Imperial Bank v. Bank of Hindustan*, L. R. 1 Ch. 437.

Hamilton Cassels, for the appellants, contended that under the wording of sec. 46 the amount of security could not be increased; if the security furnished for that amount is "proper security to the satisfaction of the Judge," the appeal must be allowed. He cited *Bolster v. Cochrane*, 2 Ch. Chamb. R., at p. 332.

OSLER, J. A., held that he had no power to increase the amount of the security. There was only one appeal; the section in question fixed the amount of \$500, and gave the Court no discretion to increase the amount because of the number of respondents.

MILLS V. MILLS.

Foreign commission—Evidence of party—Alimony action—Criminal proceedings.

There is no hard and fast rule as to the granting or refusing of a foreign commission ; it is a matter of discretion ; but in the case of the examination of a party being sought the Court will be more circumspect than in the case of an ordinary witness.

In an action of alimony where there were allegations of cruelty, and the plaintiff had also instituted criminal proceedings for bigamy against the defendant, who had left the jurisdiction and applied to be examined abroad ;

Held, that the defendant was a necessary witness and that the reason given by him for not being able to attend the trial, viz., that he was afraid to return to the jurisdiction on account of the criminal proceedings, was sufficient ; and a commission was ordered.

[April 9, 1888.—*Boyd, C.*]

THIS was an action of alimony. The defendant, the husband of the plaintiff, was in Port Huron, U. S. A., and applied for an order to have his evidence taken there on commission, alleging that he could not come into Ontario to attend the trial because of a charge of bigamy pending against him, at the instance of his wife, upon which he had been arrested, but released on bail, and had then departed to the United States. The defendant did not himself make an affidavit upon the application, but his solicitor swore to the merits of his defence, and to the reasons why he could not come into the jurisdiction.

The statement of claim alleged adultery, cruelty, and desertion on the part of the husband, and the defence alleged adultery on the part of the wife. The plaintiff, in her affidavit filed in answer to the application, denied the charges of adultery ; and she and her solicitor swore that they believed it to be absolutely necessary for the sake of justice that the defendant should be personally examined in Court.

The Master in Chambers refused to make an order for a commission, and the defendant appealed.

The appeal was argued before Boyd, C., in Chambers on the 9th April, 1888.

Hoyles, for the appeal.

F. E. Hodgins, contra.

Berdan v. Greenwood, 20 Ch. D. 764; *Lawson v. Vacuum Brake Co.*, 27 Ch. D. 137; *Langen v. Tate*, 24 Ch. D. 522; *The Parisian*, 13 P. D. 16; *Price v. Bailey*, 6 P. R. 256; *Taylor on Evidence*, Blackstone ed., 465; were referred to.

Judgment was delivered at the close of the argument.

BOYD, C.—The granting or withholding of a foreign commission is a matter which rests in the discretion of the Court. There is no hard and fast rule except that in the case of a party the Court will be more circumspect. In alimony suits the husband and wife are necessary witnesses, especially where cruelty is alleged, as in this case. That removes one ground of objection; the pleadings shew that the issues are such that the defendant will be a material witness on his own behalf. The next question is, has a case of necessity been made for examination on commission abroad instead of in open Court? There can be no doubt that the defendant is afraid to return to the jurisdiction, and for good reason. It may be in the interest of criminal justice that he should return, and it seems likely from his present attitude that the charge of bigamy is well founded; but I am only concerned to do justice in this action, and I must determine that the defendant has shewn a strong reason for not attending as a witness at the trial. As a party to the action, he would not have the privilege of a witness attending upon subpoena. The plaintiff has herself instituted the criminal proceedings, and the objection does not therefore come well from her; the defendant has good reason for saying that the action of his wife has prevented him from returning to Ontario. In a recent case before the Queen's Bench Division in England, noted in the *Law Times Journal* of the 28th January, 1888, (vol. 84 p. 226) *Light v. The Governor and Company of the*

Island of Anticosti, the Divisional Court laid down the rule that a party must shew a strong *prima facie* case why he should not attend to be examined at the trial. Here although the defendant does not himself make an affidavit, the pleadings and the circumstances shew strong and positive reasons why the defendant should not attend. He cannot come into Ontario, but he is entitled to give his version of the facts in dispute, and in the interests of justice his mouth should not be shut. The commission will therefore go. The appeal is allowed upon condition of the expenses of the plaintiff's solicitor in attending at Port Huron being paid by the defendant. The Master of this Court at Sarnia will attend at Port Huron to take the evidence. There will be no stay of the trial, and the costs will be to the plaintiff in the cause.

RE JACKSON—MASSEY V. CROOKSHANKS.

Infant—Defendant qua executor—Service on official guardian.

Held, that administration proceedings taken against an infant co-executor without observing the usual practice of serving the official guardian were invalid.

The provisions of the rules and general orders as to service in case of infancy apply whether the infant be a sole or a joint defendant, and whether he be sued personally or in a representative capacity.

[April 16, 1888.—*Boyd*, C.]

MOTION by the plaintiff to confirm the proceedings in an administration matter, in which an infant was made a defendant as a co-executor with an adult, the official guardian not having been served, as provided by Rule 36, O. J. Act.

The motion was argued in Chambers, 9th April, 1888.

W. H. Blake, for the plaintiff.

J. Hoskin, Q.C., official guardian, contra.

Judgment was delivered 16th April, 1888.

BOYD, C.—Administration proceedings have been taken in this matter against executors, of whom one is an infant, without observing the usual practice of serving the official guardian. It is justified by reference to the old law, and especially to the language of Holt, C. J., in *Coan v. Bowles*, Carth. at p. 124. He is there reported to have said that, where there are several executors defendants, of whom one is an infant, the act of one shall conclude his companion, and therefore the general appearance *per attornatum* is good for all of them; and he denied that the reason was because they were *in auter droit*. In this *dictum* he recognized and extended what was (in 1669) decided in *Foxwist v. Tremain*, 1 Mod. 47, 72, and 296, in which a majority of the Court held that if there be several executors they may all sue jointly by attorney, although some are infants. Twisden, J., dissented, and contended *fortiter* that in no case shall an infant sue or be sued, either in his own or in *auter droit* by attorney. Touching the matter of practice now before me, however, he said: "It is agreed that if an infant be defendant with others of full age, he cannot appear by attorney." He no doubt refers to a case not cited there of *Weld v. Rumney*, Style 318, decided in 1651, where against his argument, of counsel for the defendant in error, it was held in an action against two executors, of whom one was an infant, it was error to appear and plead by attorney, because he ought to have done it by guardian. One of the Judges in *Foxwist v. Tremain* (Rainsford, J.) said he had heard of no authority against what they were deciding; yet there is a case in 1647 which supports the judgment of Twisden, J. That is *Offley v. Jenney*, 3 Ca. in Ch. 72, S. C., Nels. 45, where a demurrer was allowed because one of the plaintiffs, an infant, being co-executor with the adult plaintiffs, did not charge in the bill by his guardian. But in 1715 the dictum of Holt, C. J., and the principle of the decision in *Foxwist v. Tremain* were overruled, after much deliberation, by the whole Court on error from the C. B. in *Frescobaldi v. Kinaston*, Fitzg. 1, and very much better in 1 Barnard B. R. 4 and 23,

and also in 2 Str. 783, where the unanimous judgment was, that the disability of an infant was adherent to his person, and that he had no power by law to make an attorney, and that an infant executor, though sued with others of full age, could not appear by attorney. This case settled the law, so that in *Toller on Executors* it is laid down "of co-executors, if some are of full age and others infants, the action may be against them all; but the latter cannot appear by attorney, but must appear by guardian." pp. 471-2, 7th ed., 1838.

I have no doubt that the provisions of the Rules and General Orders as to service in cases of infancy apply, whether the infant be a sole or a joint defendant, and whether he be sued personally or in a representative capacity. The scope of investigation in administration actions against an infant executor, as conducted in modern practice, is pointed out in *Re Garnes*, 31 Ch. D. 147, but I deal with nothing more now than the neat point raised. The proceedings in this Court against the infant defendant appear to me invalid, and the costs of the official guardian in regard to this objection should be paid by the plaintiff.

GIBBONS V. DARVILL ET AL.

Parties—Action to set aside conveyance as fraudulent—Grantor a necessary party.

Since the Judicature Act, in an action by a simple contract creditor, claiming merely to set aside a conveyance as fraudulent against creditors, the debtor and grantor is a necessary party as well as the grantee.

[April 6 and 14, 1888.—*Rose, J.*]

THE plaintiff, a simple contract creditor of the defendant Darvill, sued on behalf of himself and all other creditors to set aside a fraudulent conveyance from Darvill to the defendant McIntyre. The statement of claim alleged that the plaintiff was a creditor of Darvill to the amount of \$1,500 in respect of three promissory notes, and that Darvill, with intent to defraud his creditors, conveyed or purported to convey certain lands to the defendant McIntyre, who took the conveyance with full knowledge of such intent.

The prayer of the statement of claim was that the conveyance might be set aside, and declared fraudulent and void as against the plaintiff and the other creditors, or that the defendant McIntyre might be ordered to pay the outstanding purchase money of the lands into Court for the benefit of the plaintiff and the other creditors, and for an injunction to restrain payment of the purchase money by McIntyre to Darvill.

The writ of summons issued the 10th of June, 1887, and the statement of claim was delivered the 13th of September following, and on the 22nd of September the defendant McIntyre delivered his statement of defence.

On the 13th March, 1888, an *ex parte* order was granted on the application of the plaintiff by one of the local Judges at London, striking out of the writ and all proceedings the name of the defendant Darvill, who had died since the writ issued.

The defendant McIntyre appealed from this order. The appeal was argued 6th April, 1888.

Hoyles, for the appeal, referred to Rules 103, 104, and 406; *Pyper v. Cameron*, 13 Gr. at p. 136; *Miller v. Hall* 40 N. Y. Sup. 262; and *Daniell's* Ch. Pr., Am. ed., p. 256.

Shepley, for the plaintiff, relied on *Bump* on Fraudulent Conveyances, p. 548, and Rule 170.

ROSE, J., allowed the appeal, holding that the *ex parte* order was improper, and that upon the pleadings as framed the defendant Darvill or his estate ought to be represented in the action; but gave leave to the plaintiff to make any special application that he might be advised in order to get rid of the representation of Darvill.

Pursuant to such leave on the 14th of April *Shepley* moved for an order to amend the statement of claim by striking out from it all claim to relief other than merely to set aside the conveyance in question, as fraudulent and void as against the plaintiff and other creditors, and also by striking out the name of the defendant Darvill; citing in support of the motion *Longeway v. Mitchell*, 17 Gr. 190.

Hoyles, contra.

ROSE, J.—I have conferred with the Chancellor, and we agree that under the Judicature Act a different practice prevails to that acted upon in *Longeway v. Mitchell*. Now all persons interested should be parties to the record, so that the whole matter may be disposed of at one time. It is no longer proper for a simple contract creditor to bring an action against an alleged fraudulent grantee alone, claiming merely to set aside the conveyance; the debtor and grantor should also be a party.

Application refused with costs.

GLASS V. GRANT ET AL.

Pleadings—Summary application to set aside—Demurrer—Res judicata—Counter-claim against third party.

As a general rule pleadings should not be set aside on summary applications unless so plainly frivolous or indefensible as to invite excision. Where a matter is doubtful or difficult it is better to leave the objecting party to demur; and even if the pleading appears to be demurrable, that is not a sufficient reason for expunging it from the record.

And where, in an action by the assignee of C. for the benefit of his creditors under 48 Vic. ch. 26, (O.) stated to be brought for the benefit of one of such creditors, the F. Bank, to set aside a mortgage made to the defendants, as fraudulent and preferential, a judgment for foreclosure of the mortgage obtained against the plaintiff was pleaded as a bar to the action, and a counter-claim was asserted for payment by the F. Bank of certain moneys alleged to be due to the defendants, a motion to strike out such defence and counter-claim was refused, and the plaintiff was left to demur.

Seem, that the counter-claim was not inadmissible.

[April 18, 1888.—*Boyd, C.*]

AN application by the plaintiff to strike out part of the statement of defence and the whole of the counter-claim was referred by one of the local Judges at London to a Judge in Chambers, and was argued before Boyd, C., on the 16th April, 1888.

The action was brought by the assignee under 48 Vic. ch. 26 (O.), for the benefit of the creditors of Benjamin Cronyn, against the defendants as trustees under a marriage settlement.

The statement of claim stated that, prior to the assignment to the plaintiff, Cronyn mortgaged certain lands of his to the defendants, and charged that there was no consideration for such mortgage, but that it was made with intent to defeat, delay, and prejudice creditors, and to give the defendants a preference over other creditors. It was also stated that the action was brought for the benefit of the Federal Bank of Canada, creditors of Cronyn. The prayer was that the mortgage should be declared fraudulent and void.

The statement of defence denied the fraudulent intent charged, and besides alleged that after the assignment to

the plaintiff the defendants brought an action for foreclosure of the mortgage in question, making the plaintiff a defendant in such action, and that such proceedings were had that judgment for foreclosure was obtained and a report made thereunder, and the defendant pleaded such judgment and report as a bar to this action. And by way of counter-claim the defendant set up a claim against the Federal Bank (for whose benefit the action was brought) for moneys of the trust estate which were confided to Cronyn as a solicitor, and which, as they alleged, he misapplied and used in payment of a debt to the Federal Bank, with knowledge on the part of the bank that such moneys were trust moneys and were so misapplied; and they also asked to prove against the estate of Cronyn in the hands of the plaintiff for the sums so misapplied by Cronyn.

The motion was to strike out the part of the defence which set up the foreclosure judgment as a bar to this action, and the whole of the counter-claim.

Hellmuth, for the plaintiff.

J. Macleennan, Q.C., for the defendants, submitted to have the part of the counter claim asking to prove against the estate struck out, but opposed the motion in other respects.

BOYD, C.—As a general rule I think the Judge should be chary in setting aside defences on a summary application, unless the pleading is so plainly frivolous or indefensible as to invite excision. Where a matter is doubtful or difficult it is better to leave the objecting party to demur than by a chambers order striking out to limit the other side in his right of appeal. Here I should not be disposed to uphold the defence complained of on demurrer, but that does not appear to me to be a sufficient reason for expunging it from the record. I therefore leave the plaintiff to demur, if he is so advised, and will give him leave to reply and demur, if he asks it.

I do not regard the counter-claim as an inadmissible defence, if the part relating to proof against the estate of the insolvent is struck out. This was agreed to by Mr. Maclellan on the argument. It is premature now to discuss the method of trial, and I do not prejudice any subsequent application for this purpose. Costs of this motion will be in the cause.

HACKETT V. BIBLE.

Solicitor and client—Authority of solicitor to settle—Variation of interpleader order.

A solicitor retained to collect a debt is not entitled to interplead without a further retainer for that purpose, but being so retained he has the ordinary rights of solicitors as in other contested cases.

And where solicitors properly representing the claimant and the execution creditors in an interpleader made an arrangement by which \$441 of the claim made and provided for in the interpleader order was abandoned, and the sheriff, by the direction and consent of both the solicitors, in good faith distributed \$441 among the creditors entitled, and paid only the balance into Court, instead of the whole proceeds of the sale, as directed by the interpleader order, which was not amended :

Held, that the solicitors had authority to make such a variation of the order, and the sheriff was justified in acting upon it ; and it made no difference that the interpleader order was a consent order, for it was an interlocutory order, and the variation did not affect third parties.

[April 18, 1888.—*Boyd, C.*]

A MOTION by one Eveleigh, the claimant in a sheriff's interpleader, to compel the sheriff of Bruce to pay into Court the sum of \$441.

The interpleader order directed the sheriff, in default of security being given for the goods which were the subject of the interpleader, to sell them and pay the proceeds into Court.

A settlement was arrived at, after the order, between the claimant and the execution creditors, by which the claim of the former was reduced to \$200, and the sheriff, upon the request of the plaintiff's solicitor, and with the consent of that solicitor and the solicitors for the execution credi-

tors, distributed \$441 of the \$641 to the creditors entitled under the Creditors' Relief Act, and paid the balance of \$200 into Court.

Eveleigh, the claimant, now sought to repudiate the consent given by his solicitor, and to compel the sheriff to pay \$441 into Court.

The Master in Chambers refused to make the order asked, and the claimant appealed to a Judge in Chambers.

The appeal was argued on the 16th April, 1888.

Bain, Q.C., for the appeal.

H. J. Scott, Q.C., for the sheriff, contra.

Judgment was given on the 18th April, 1888.

BOYD, C.—A solicitor retained to collect a debt is not entitled to interplead without a further retainer for that purpose: *James v. Ricknell*, 20 Q. B. D. 164; but being so retained, he has the ordinary rights of solicitors, as in other contested cases. In that case Wills, J., says: "Proceedings in interpleader are substantially a second action." We have here solicitors properly representing the claimant and the execution creditor in this interpleader, making an arrangement by which one part of the claim made and provided for in the interpleader order was abandoned. This arrangement was by them communicated to the sheriff, who was thereupon directed by them to deal with so much of the property seized as was released by the abandonment of the claim for the benefit of the execution creditors. The sheriff thereafter in good faith made distribution of the proceeds of that part of the property, and retained in his hands sufficient to answer the interpleader claim in its limited scope. The question is, had the solicitors authority to make such a variation of the order, and was the sheriff justified in acting upon it, the interpleader order not being amended so as to limit the claim? By the order the sheriff was to sell if no security was given, and pay the whole proceeds into Court. The sale was had, but

only so much of the proceeds paid in as answered the limited claim, *i.e.*, \$200, and the balance of the proceeds was distributed under the Creditors' Relief Act by the sheriff. It is argued that this interpleader order was settled as it is by consent. That does not appear material. It has been decided that a consent judgment cannot be disturbed by the solicitors of the parties agreeing thereto, to the prejudice of third parties, but this does not extend to a consent matter which has not passed into *rem adjudicatam*, but is in the shape of an interlocutory order, and the variation whereof does not prejudice third parties: compare *The Belcairn*, 10 P. D. 161, with *The Ardandhu*, 11 P. D. 40, affirmed in 12 App. Cas. 256.

As between solicitor and client, the former has power to compromise, not only without, but contrary to, the wishes and directions of the latter, so long as the opponent or other person dealt with has not notice of the solicitor's ostensible authority being limited: *Vardon v. Vardon*, 6 O. R. at p. 736. In some respects the solicitor's authority is more extensive than that of counsel: as put by Brett, M.R., in *Regina v. Registrar of Greenwich County Court*, 15 Q. B. D. at p. 58: "A solicitor is his client's representative. That is his normal character. He represents his client in court, and he represents him out of court." As representative of the client the solicitor for the claimant here agreed in effect to abandon so much of the claim, and the solicitor for the defendant (the execution creditor) assented to this, and both direct the sheriff to proceed concerning the balance as if the interpleader order had not been made. This appears to me to be a manner of dealing within the competence of the solicitors: *Scully v. Dundonald*, 8 Ch. D. at p. 669; *King v. Pinsonneault*, L. R. 6 P. C. 245, 261. The result is that the Master's order should not be disturbed, but affirmed, with costs.

Since writing the foregoing I have noticed the case of *Watson v. Cave*, 17 Ch. D. 23, where defendant's solicitor proposed to withdraw the appeal, and plaintiff's solicitor consented. The client was bound by this, and was not

allowed to recede, Lush, L. J., saying: "The proposal made on the one side and agreed to on the other amounted to a contract which was binding on the parties, and did not require in order that it should be perfected, that the appeal should be actually struck out of the list."

RE BROOKFIELD AND THE TRUSTEES OF PUBLIC SCHOOL
SECTION NO. 12 OF THE TOWNSHIP OF BROOKE.

Mandamus—Motion for in Court or Chambers—Costs—O. J. Act, sec. 17, sub-sec. 8—R. S. O. (1877) ch. 52, sec. 17.

Sec. 17, sub-sec. 8, of the O. J. Act applies to motions for *mandamus*, etc., where an action is pending; but R. S. O. (1877) ch. 52, sec. 17, specially authorizes a summary application for a *mandamus* in Chambers.

Kincaid v. Kincaid, 12 P. R. 462, distinguished.

And where a summary application for a *mandamus* was made to the Court, costs as of a Chambers application only were allowed to the applicant, where the circumstances did not justify the imposition of a larger amount of costs than was sufficient to indicate that the respondents were in the wrong.

[April 23, 1888.—*Boyd, C.*]

THIS was an application for a *mandamus* to compel the above named trustees to receive back the children of the applicant to a public school, from which they had been expelled.

Before the motion was heard the trustees took the children back, and the question of costs only was argued before Boyd, C., in Court on the 11th April, 1888.

Snelling, for the applicant.

F. E. Hodgins, for the trustees.

Judgment was delivered on the 23rd April, 1888.

BOYD, C.—*Kincaid v. Kincaid*, 12 P. R. 462, before my brother Ferguson, was an application for the appointment of a receiver and he did not cut down the costs to

those of a chambers motion, but held that costs of a Court motion should be taxed, having regard to the Judicature Act, sec. 17, sub-sec. 8. That section contemplates the pendency of an action, as it speaks of "interlocutory order:" *Smith v. Cowell*, 6 Q. B. D. 75. There is, besides, no statute as to receiver similar to that relating to mandamus, which authorizes an application in chambers: R. S. O., (1877) ch. 52, sec. 17.

No writ was issued in this proceeding, which is of a summary nature under the Revised Statutes. The only matter left to be disposed of is costs. The defendants were wrong and high-handed in their expulsion of the children, and should pay the costs up to and inclusive of the 20th of March, but no larger sum should be taxed than if it had come on in chambers. Either party might then have ended the matter by bringing to the attention of the Court that only costs were involved, and that the whole question was whether a counsel fee should be taxed as in Chambers or in Court. I give no special direction for payment of costs by the defendants as a corporation—in whatever character they are made defendants, in that they will pay costs. Important motions for relief by mandamus have been brought on in Chambers: *Demorest v. Midland R. W. Co.*, 10 P. R. 73, and this does not appear to be such a case as to justify the infliction on the trustees of a larger amount of costs than is sufficient to indicate that they were in the wrong.

MORROW V. CHEYNE ET AL.

Pleading—Action for malicious prosecution—Observations of Judge at trial of criminal charge—Publication of charge.

In an action for malicious prosecution, a part of the statement of claim setting out the observations of the Judge before whom the plaintiff was tried upon the criminal charge out of which the action arose, was struck out; but a part stating damage to the plaintiff from publication of such charge in newspapers and otherwise by defendants, was allowed to stand.

[April 17, 1888.—*The Master in Chambers.*]

MOTION by the defendants to strike out parts of paragraphs 7 and 8 of the statement of claim in an action for malicious prosecution.

The 7th paragraph states that the plaintiff was tried upon a criminal charge of fraud preferred by the defendants, that the learned trial Judge directed the jury to find the plaintiff "not guilty" at the close of the case of the prosecution, without any evidence being called for the plaintiff, and that in his direction the learned trial Judge characterized the prosecution and indictment as an abuse of the process of the criminal Courts for the purpose of enforcing the payment of a debt, and stated, among other things, that the prosecution never should have been commenced.

The 8th paragraph states that in consequence of being given into custody, and of the prosecution, and of the publication by the defendants of such charges and proceedings in the newspapers and otherwise, the plaintiff suffered damage, &c.

The parts sought to be struck out were those setting forth the Judge's observations in paragraph 7, and those stating damage to the plaintiff from the publication of the charge by the defendants in newspapers and otherwise, in paragraph 8.

The motion was argued on the 16th of April, 1888.

Shepley, for the motion.

C. Millar, contra.

Judgment was delivered 17th April, 1888.

THE MASTER IN CHAMBERS.—The two things stand on very different grounds, in my opinion.

As to the observations made by the learned Judge on the criminal trial, which are alleged to have censured the prosecution by the defendant, I thought on the argument that they were probably admissible; that the evidence given on that trial and the Judge's charge might be given in evidence on the civil trial, as part of the *res gestæ*. Not that that evidence would prove on the civil trial the truth of the facts asserted in it, for the purpose of the civil trial, which it would not do, but to shew the course of the case as made out before the criminal Court.

As to the charge and observations of the Judge I am now satisfied that I was wrong. See the 15th ed. of *Roscoe on Evidence*, page 813. I have read the cases there cited, that is such as are reported. And it would seem that in the opinion of Lord Kenyon and Littledale, J., such evidence would be admissible, but Lord Denman and Mellor, J., in more recent cases think that it would not. Surely all these are very good names. Then the weight of reason is, I think, far, far in favour of the latter opinion, as stated in Lord Denman's judgment in *Baker v. Angell*, 2 M. & Rob. 371, and that of Mellor, J., in *Wetzlar v. Zachariah*, 16 L. T. N. S. 432. To the observations of the learned Judge on the criminal trial there could be no reply, and the Judge had necessarily not heard the evidence in the civil case in which it was sought to adduce his opinion as evidence. The matter might assume a very different aspect on the evidence given on the civil trial.

The opinion of the learned editor of *Roscoe on Evidence* is in accordance with this latter view; and upon this ground it was that Mr. Shepley put the case in the argument before me.

Then I also think that I ought certainly to act on this opinion, because any objection of the defendant will come too late if it be left to the trial, for, being alleged in the

statement of claim, it may be read and dwelt upon by plaintiff's counsel in his opening address, and then it would be too late for the defendant to object effectually.

As to the objection to the 8th paragraph, complaining of the publication by the defendants of the charges and proceedings in the newspapers and otherwise, I think the averment of the plaintiff must remain as it is. In the first place it does not necessarily shew any such publication as an action could be sustained for. Those charges might be spoken of and put into newspapers in a manner injurious to the plaintiff, but in such way that no action for slander or libel could be sustained against the defendants for the publication. Recollect it would be but a true report, perhaps, of actual legal proceedings in a Court of justice. It is easy to imagine many such cases, and the plaintiff does not charge the publication as slander or libel and he may mean that for which no such action could be sustained. But suppose the averment to refer to a technical libel, can the defendant be then in any danger? In an action for slander, for instance, plaintiff may prove other words than those in the declaration, and said on a different occasion, but thereupon defendant may prove such words to be true, because he has had no opportunity of justifying them in pleading: *Warne v. Chadwell*, 2 Stark. 457; and as to giving damages for words not stated in the declaration in libel, Sir Frederick Pollock says in *Darby v. Ouseley*, 1 H. & N. at p. 13: "Then it is objected that the learned Judge did not tell the jury that they ought not to give damages for the publication subsequent to the libel. In one sense that may be so; but then the subsequent publication was evidence of malice, and would, therefore, aggravate the damages." But in this case that with which the defendant is threatened appears on the statement of claim, and therefore could be no surprise to him.

Any facts which may be given in evidence as to damages may be stated on the pleadings: *Scott v. Sampson*, 8 Q. B. D. 491.

SWAIN V. STODDART.

Security for costs—Interpleader issue—Local Judge, jurisdiction of.

A local Judge in whose county the proceedings is an action out of which an interpleader arose were carried on, and who himself made the interpleader order, has power to make an interlocutory order in the issue thereby directed.

Coulson v. Spiers, 9 P. R. 49, followed.

A party to an interpleader issue may be ordered to give security for costs.

The dictum of the Master in Chambers in *Canadian Bank of Commerce v. Middleton*, 12 P. R. 121, not approved.

Williams v. Crosling, 3 C. B. 956, followed.

[April 5, 1888.—*Galt*, C. J.]

AN appeal by the defendant in an interpleader issue from the order of the local Judge at Stratford, requiring the defendant, who lived out of the jurisdiction, to give security for the plaintiff's costs of the issue. The order directing the issue was made by the same local Judge upon the application of the sheriff of Perth, who had seized goods under the execution of the defendant in the issue, which were claimed by the plaintiff in the issue.

The proceedings in the original action in which the defendants obtained judgment and execution were carried on at Stratford.

C. J. Holman, for the appeal, cited, in addition to the authorities mentioned in the judgment, the case of *Dominion S. & I. Co. v. Kilroy*, 12 P. R. 19, upon the question whether the local Judge had jurisdiction to make the order.

Aylesworth, contra.

GALT, C. J.—This is an appeal from an order made by the learned Judge of the county of Perth ordering the defendant to give security for costs. It is an interpleader suit arising out of a case of *Stoddart v. Swain*. The defendant in the interpleader suit is an execution creditor; the plaintiff, Swain, is the claimant. The learned local Judge made the order appealed from. Mr. Holman, for

the defendant, contended that the local Judge had no authority to make such an order. Mr. Aylesworth, contra, contended that this question had been decided by Osler, J., in the case of *Coulson v. Spiers*, 9 P. R. 491. On referring to that case I find that both the learned counsel were engaged in that suit. The learned Judge was of opinion that the local Judge had jurisdiction; this objection therefore fails. Mr. Holman then urged that according to the judgment given by the learned Master in Chambers, in the case of *Canadian Bank of Commerce v. Middleton*, 12 P. R. 121, he had expressed a very strong opinion, "that in Ontario there is a right to security for costs from a foreign claimant in the case of a garnishment, and that there would be no such right on a sheriff's interpleader, where goods seized under a *fi. fa.* have been claimed." This latter question was not then before the learned Master for decision.

The case of *Williams v. Crosling*, 3 C. B. 957, appears to me to be an express finding that in a case like the present the execution creditor, although the defendant in an interpleader suit, can and should be ordered to give security when resident out of the jurisdiction. The facts of that case are the same as those now before me. In giving his judgment (the case was an appeal from an order which he had made) Maule, J., says (p. 963): "I think justice requires that the execution creditor (who was resident in Scotland) should be compelled to give security for costs; and I think it will operate no hardship on him so to do; whereas, a contrary course would be manifestly unjust towards the assignees. I see no reason for altering the position of the parties. The assignees (the claimants) are properly made plaintiffs; for if they fail to prove their case, the execution creditor will, of course, sustain his execution."

Appeal dismissed, with costs to the plaintiff in the cause.

HUFFMAN V. DONER.

Judgment—Combined interlocutory and final—Rules 72, 75.

Where a writ of summons is indorsed with the particulars of a liquidated demand and also with a claim for unliquidated damages, the plaintiff may, without an order, sign a combined final and interlocutory judgment upon default of appearance; Rules 72 and 75 may be combined in a proper case, and justify such a judgment.

Bissett v. Jones, 32 Ch. D. 635, followed in preference to *Standard Bank v. Wills*, 10 P. R. 159.

[May 8, 1888.—*Boyd, C.*]

AN appeal by the defendant from an order of the local Judge at Welland, dismissing a motion to set aside as irregular a judgment signed by the plaintiff for default of an appearance.

The writ of summons was specially indorsed with the particulars of a liquidated demand, and also a claim for unliquidated damages; and there being no appearance, the plaintiff signed a combined final and interlocutory judgment—final as to the liquidated demand, and interlocutory as to the damages.

The appeal was argued in Chambers on the 7th May 1888. The Rules and cases cited are referred to in the judgment.

W. M. Douglas, for the appeal.

Middleton, contra.

Judgment was delivered on the 8th May, 1888.

BOYD, C.—By Rule 5 the writ of summons shall be indorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action.

By Rule 11 it shall not be essential in this indorsement to set forth the precise ground of complaint, or the precise remedy or relief to which the plaintiff considers himself entitled.

By Rule 14 in all actions where the plaintiff seeks merely to recover a debt or liquidated demand in money, &c., the writ of summons may be specially indorsed with the particulars of the amount sought to be recovered.

The indorsement under Rule 5 is imperative ; that under 14 as to special indorsement is optional.

In the appendix of forms are to be found models to be followed in the case of special indorsements, and also in that of the other compulsory indorsements, whether the demand be for "money claims" or for "damages and other claims:" App. A., pt. ii., Nos. 4 and 6.

The plaintiff's indorsement in this case is of a mixed character; claiming at first \$326.46, of which \$295.46 is claimed with particulars as under a special indorsement, and the balance, \$31, is claimed as for the wrongful conversion of the plaintiff's goods. This variation or modification is justified by Rule 485, particularly as the Act permits a joinder of such causes of action. Such a course is also recognized as proper by the phraseology of Rule 208.

Rule 15 provides that when the plaintiff's claim is for a debt or liquidated demand only, the indorsement, besides stating the nature of the claim, shall state the amount claimed for debt, or in respect of such demand, and for costs, respectively, and shall further state that upon payment thereof within 8 days, &c., further proceedings will be stayed. This is also a compulsory provision and relates to all writs in which a debt or liquidated demand only is claimed, whether specially indorsed or not.

The defendant not having appeared, the plaintiff signed final judgment as to the liquidated claim, and interlocutory judgment as to the other part, of his own motion and without any Judge's order.

Rule 72 provides for signing final judgment in case of non-appearance by defendant where the writ of summons is specially indorsed under Rule 14.

Rule 74 is for the case of a writ not specially indorsed, but where the action is for a debt or liquidated demand only, and in the event of non-appearance, a statement of particu-

lars of the claim in respect of the causes of action indorsed on the writ may be filed and served, and thereafter judgment may be signed as provided.

Rule 75 is relied on as justifying this judgment, and it reads: "Where the defendant fails to appear to the writ of summons and the plaintiff's claim is not for a debt or liquidated demand only, but for detention of goods and pecuniary damages, or either of them, no statement of claim need be delivered, but interlocutory judgment may be entered, and the value of the goods and the damages, or the damages only, as the case may be, shall be assessed," &c.

The form of judgment is the same where the plaintiff proceeds for a debt or liquidated sum, whether he specially indorses or not; the effect and operation of the special indorsement is merely to accelerate the period of recovery in case of default by the defendant: Forms 147-8.

Rule 208 is important as shewing that the Act contemplates two judgments on the same writ in such a case as this; but it provides in terms for such a judgment only where the default arises at a later stage than here. I have no doubt that the plaintiff might have obtained such a judgment as is now objected to if he had made application to the Court or Judge previous to signing it; it is not detrimental to the defendant, and it is a saving of expense to hold that it may be done in a summary manner, where the two causes of action are perfectly distinct and consistent, as here. If the plaintiff had proceeded upon two writs he would have had two judgments by default, regular in every respect. Why not give a liberal construction to the Act, and if the double indorsement on the writ is regular (as I hold it is) conclude that the double judgment is also regular? I should not have hesitated thus to decide but for the opinion expressed by my brother Ferguson in *Standard Bank v. Wills*, 10 P. R. 159, to the effect that summary judgment for a specially endorsed claim is permissible only where the action is limited to that claim. But the contrary has been held by Mr. Justice Chitty in *Bissett v. Jones*, 32 Ch. D. 635, on an

analogous English Rule The possibility of having two judgmentsashere, one interlocutory and one final under Rule 75, is recognized by a very experienced officer in England. See *Walker's Practice on Signing Judgments*, p. 31. And in *Seton on Decrees*, 4th ed., p. 9, speaking of the English Rules of 1875, which are the same as those now under consideration, it is said that under O. xiii. r. 6, (*i.e.*, our Rule 75) the plaintiff may enter final judgment for a debt or liquidated damages claimed, and also enter interlocutory judgment for detention of goods or pecuniary damages also claimed. The new Rule of 1883 in England, which is reproduced in the new Consolidated Rules to take effect next September, as No. 711, is, I take it, declaratory of the practice and passed *ex cautela*. I think the Rules 72 and 75 may be combined in a proper case, and justify the double judgment here signed.

I dismiss the appeal, but in the circumstances without costs.

LOWDEN ET AL. v. MARTIN ET AL.

Promissory note—Proposal to renew in part refused—Effect of acceptance of cheque for balance—Judgment under rule 80.

At maturity of certain promissory notes made by the defendants, and held by the plaintiffs, the defendants sent the plaintiffs a proposal for a renewal in part, accompanied by a cheque for part of the amount due and two renewal notes for the balance, the total amount including a sum for interest on the renewals. The plaintiffs returned the renewal notes, but retained the cheque, and brought this action upon the original notes, giving credit for the amount of the cheque.

Held, by STREET, J., in Chambers, refusing a motion for judgment under Rule 80, that although there was no obligation on the part of the creditors to assent to the debtors' proposal, yet by receiving the cheque and keeping it they must be taken to have applied it in the manner in which the debtors when tendering it stipulated, and as it included interest in advance upon the renewals, the creditors were bound to give the debtors the benefit of the time for which the renewals were drawn.

Held, by a Divisional Court, on appeal, that on the state of facts presented the plaintiffs were not entitled to the indulgence of a speedy judgment and execution.

[March 12, 1888.—*Street, J.*]

[May 22, 1888.—*The Queen's Bench Division.*]

THIS was an appeal by the plaintiffs from an order of the Master in Chambers, dismissing with costs a motion for judgment under Rule 80.

The plaintiffs held two notes made to them by the defendants, amounting in all to a little over \$300. One of them being a few days over due, and the other just due, the defendants sent their book-keeper to the plaintiffs' place of business with two renewal notes for \$100 and \$155, respectively, and a cheque for \$51.75, the whole making about \$1 beyond the amount which was due upon the notes held by the plaintiffs, and instructed him to give up the notes and cheque if the plaintiffs would give up the notes then held by them. The book-keeper thereupon saw one of the plaintiffs in his office, and handing him the cheque and notes, told him they were in full settlement of the notes which had matured. He examined the cheque and notes, and throwing back the notes, said he would keep the cheque and apply the proceeds on account of the amount due the plaintiffs. The book-keeper returned the notes.

which he had brought and left them in the plaintiffs' custody, where they still remain at the time of the motion. The plaintiffs thereupon brought this action upon the original notes, giving credit for the \$51.75. Upon the application to the Master in Chambers for judgment under Rule 80, he held that the plaintiffs were bound to return both the cheque and the notes if they did not intend to accept the plaintiffs' proposal to renew the over-due paper.

The appeal was argued before a Judge in Chambers on the 9th March, 1888.

Kappele, for the plaintiffs.

Echlin, for the defendants.

Judgment was given on the 12th March, 1888.

STREET, J.—I think the view taken by the learned Master was the correct one; a debtor when paying money to his creditor upon an over-due debt cannot, it is true, insist upon the performance of any promise to give him time for which he stipulates when paying the money, because of the absence of any sufficient consideration: but what took place here goes beyond such a transaction. The debtor in effect proposed to the creditor certain terms involving a renewal, in part, of the debt, and a cash payment of the balance, and of a sum intended to represent, no doubt, the discount on the renewals; the cheque and renewals were handed to the creditor, upon the understanding that the proposed transaction should be carried out by the creditor. There was no obligation on his part to assent to the debtor's proposal, but by receiving and keeping the cheque he must be taken to have applied it in the manner in which the debtor, when tendering it to him, stipulated that it should be appropriated, and as it included interest in advance upon the notes by which it was accompanied, the plaintiffs are bound to give to the defendants the benefit of the time for which those notes were drawn.

As to the effect to be given to the acceptance of money tendered by a debtor with a stipulation as to its appropriation, see *Croft v. Lumley*, 6 H. L. C. at pp. 697 and 706; *Leake on Contracts*, (ed. of 1878,) pp. 914, 915.

I think the appeal should be dismissed, with costs.

The plaintiffs appealed from this decision, and their appeal was argued before a Divisional Court, composed of Armour, C. J., and Falconbridge, J., on the 22nd May, 1888.

Kappele, for the plaintiffs, contended that there was no consideration for the extension of time, and that the liability on the notes was not suspended by the acceptance of the cheque. He cited *Foakes v. Beer*, 9 App. Cas. 605.

F. W. Garvin, for the defendants, was not called on.

ARMOUR, C. J.—This is not a case for granting the plaintiffs a speedy judgment and execution. We express no opinion on the question of law; all we say is, that on the state of facts shewn here we cannot give the plaintiffs the indulgence which they ask, and so shut the defendants out from raising their defence. The plaintiffs are not in a position to ask favours; they have not come into Court with clean hands. The appeal must be dismissed with costs.

FALCONBRIDGE, J., concurred.

Appeal dismissed, with costs.

THE BANK OF LONDON V. THE GUARANTEE COMPANY OF
NORTH AMERICA.

Payment into Court—Withdrawal of part of claim—Dismissing action—Costs—Rules 170, 218.

The plaintiffs claimed in this action \$3,249.36, "amount of defalcation of J." and \$90.55 for certain expenses connected therewith, in all \$3,339.91. The defendants paid into Court \$3,273, claiming by their notice of payment in, that it was sufficient to satisfy the plaintiffs' claim. There was no no specific application of the money paid in to any part of the claim. The plaintiffs did not deliver a statement of claim, and, upon notice of a motion under rule 203 to dismiss the action being served by the defendants, the plaintiffs gave a notice under Rule 170 of withdrawal of the balance of their claim.

Held, that the plaintiffs had no power under Rule 170 to withdraw; the portion of Rule 170 relating to the withdrawal of part of the alleged cause of the complaint is applicable only where the part sought to be withdrawn can be severed from the rest of the claim; and an order dismissing the action was proper.

Semble, that the plaintiffs, not having under Rule 218 accepted the money in full satisfaction of their claim, were liable to pay the whole costs of the action; but the disposition of costs by the local Judge who made the order was not interfered with on appeal.

[May 22, 1888.—*Rose, J.*]

THIS was an appeal by the plaintiff from an order of one of the local Judges at London, dismissing the action for want of prosecution.

The facts are set out in the judgment.

Aylesworth, for the appeal.

H. J. Scott, Q. C., contra.

ROSE, J.—This action was brought to recover \$3,249.36, "amount of defalcation of George Jones," and \$90.55 "expenses incurred in going at the request of defendants to Tiffin, Ohio," in all \$3,339 91

The defendant company paid into Court .. 3,373 00

Leaving a balance of..... 66 91

The notice of payment claimed that it was sufficient to satisfy the plaintiff's claim.

The plaintiff did not file a statement of claim. Its solicitor urges by way of excuse that he was urging a settlement upon the defendant's solicitors, and hoping to secure one, did not go to the additional expense.

No statement having been delivered within the prescribed time, the defendant moved to dismiss under Rule 203.

The plaintiff thereupon filed and served a notice of withdrawal under Rule 170, which provides that "the plaintiff may, at any time before receipt of the defendant's statement of defence, or *after the receipt thereof* before taking any other proceeding in the action (save any interlocutory application) by notice in writing, filed and served, wholly discontinue his action or *withdraw any part or parts of his alleged cause of complaint*; and thereupon he shall pay the defendant's costs of the action, or *if the action be not wholly discontinued, the defendant's costs* occasioned by the matter so withdrawn.

(a) Such costs shall be taxed, and such discontinuance or *withdrawal*, as the case may be, *shall not be a defence to any subsequent action.*"

The learned Local Judge Davis made an order dismissing the action for want of prosecution, with costs to the defendant from and inclusive of appearance, to be taxed; but gave the plaintiff its costs down to and inclusive of payment of the money paid "in satisfaction" of the claim.

From such order this appeal was taken, the plaintiff complaining:

1. That it had the right to withdraw part of the "alleged cause of complaint," to wit: the \$66 not paid into Court; and that the order was wrong in dismissing the action.

2. That it was wrong in directing the plaintiff to pay the costs of the appearance.

It seems to me that the plaintiff had no power to "withdraw." I read that portion of Rule 170 as applicable only where the part sought to be withdrawn can be severed from the rest of the claim, as for instance, where there are specific items, and the plaintiff seeks to withdraw one or more of them.

I cannot intelligently apply the rule where, for instance, the claim is for, say \$150, price agreed to be paid for a horse, and the contract is put in issue, and the defendant pays, say \$140, into Court as being its full value; or for damages in trespass, seduction, or the like, where a portion of the amount claimed is paid into Court. If, say \$500 were claimed, the defendant might pay into Court \$450 in full, and the plaintiff might, on the plaintiff's contention, take out the \$450, and withdraw the claim for the \$50 and bring a fresh action for that sum. This, I think, he may not do. Here there was no specific application of the amount paid into Court; and I cannot tell what the \$66 represented, nor does the plaintiff suggest whether it forms part of the defalcation or part of the expenses.

Where money is paid into Court under Rule 215, the plaintiff may, under Rule 217, take it out and proceed for the balance, or under Rule 218, within four days accept it in satisfaction of the causes or action in respect of which it is paid in. If he do the latter, he would be entitled to his costs. In this case if the plaintiff can be said to have acted under Rule 217, then the determination was to proceed with the action, and so determining, the statement of claim should in due course have been filed, It not having been filed, the plaintiff was in default under Rule 203, and I think the action was properly dismissed.

It was urged that the "action" should not have been dismissed, for as to the major part of it the plaintiff had succeeded. I think the order a proper one, notwithstanding this argument; for if the plaintiff had gone on to trial and had failed, it would nevertheless have been entitled to retain the money paid into Court: *Emden v. Carte*, 19 Ch. D. 311; and *Berdan v. Greenwood*, 3 Ex. D. 251. It seems to me the plaintiff was in no better position than if the action had proceeded to trial and been there dismissed by reason of the plaintiff failing to appear, or on any other ground.

I do not see how the order as to costs can be successfully attacked. It is true that Rule 203 provides that the Court

or Judge "may, if no statement of claim have been delivered, order the action to be dismissed accordingly, or may make such *other* order * * as to the Court or Judge shall seem just;" but here the order was for dismissal only, no other order was necessary, and the plaintiff not having taken advantage of the rule referred to, where money has been paid into Court, could not, in my opinion, have successfully complained if the payment of all costs of the action had been ordered. See *Tobin v. McGillis*, 12 P. R. p. 60. By the exercise of discretion not complained of by the defendant, a portion of the costs has been given to the plaintiff. Whether in the exercise of such discretion, the costs of the application should not have been withheld from the defendant, is not, I think, open to review.

The appeal fails and must be dismissed, with costs in the cause to the defendant.

RE M'LEOD V. EMIGH (2).

Costs—Motion for prohibition.

By R. S. O. (1877) ch. 52, sec. 2, a successful party on an application for a writ of prohibition is entitled to and should be awarded costs unless the Court in the proper exercise of a wise discretion can see good cause for depriving such party of them; and such party should not be deprived of costs unless there appear impropriety of conduct which induced the litigation, or impropriety in the conduct thereof.

Under the circumstances of this case, reported ante p. 450, the defendant was allowed costs of a successful motion for prohibition to a Division Court.

[May 26, 1888.—*The Common Pleas Division.*]

THE judgment of the Court on a motion for prohibition to a Division Court in this case is reported ante p. 450.

The Court afterwards reconsidered the question of costs, and gave judgment thereon on the 26th May, 1888.

A. M. Grier, for the plaintiff.

Aylesworth, for the defendant.

ROSE, J.—When we delivered judgment herein Mr. Grier asked us to postpone judgment as to costs, as he wished, with the leave of the Court, to hand in a memorandum of authorities. This we granted, and he has furnished us with a statement of authorities, and points for consideration; Mr. Aylesworth, for the applicant, at the same time giving us a reference to such authorities as he deemed would support his claim for costs.

I think we must hold as a fact that the question of jurisdiction was raised in the Court below.

2. That the merits are not so clearly with the plaintiff in the Division Court that the resistance to the claim is unconscionable. It is at least doubtful if judgment might not well have been in her favour—if that makes any difference.

3. That in opposing the application to commit her as a judgment debtor, she was resisting an attempt to press a severe remedy, and as we have held the motion of the

plaintiff to have been ill founded, the merits on the application were with the applicant.

4. Chapter 52, R. S. O. 1877, sec. 2, entitles her to costs, unless the Court, in the proper exercise of a wise discretion, can see good cause for depriving her of them; and as it appears to me, she should not be deprived of them unless there appear impropriety of conduct which induced the litigation, or impropriety in the conduct of the litigation; and I do not find either on the record before the Court.

If no good cause appear for depriving the litigant of costs, it is manifestly unjust that she should successfully appeal to the Court against the issue of process intended to place her in prison, and be fined for success by being made to pay her own costs. I think it better in all cases that the successful litigant should recover costs than to allow sympathy for the unsuccessful litigant to lead the Court to lighten the burden sustained in defeat by shifting a portion on to the shoulders of the successful party.

It is very like the vice against which jurors are so often warned of being generous at the expense of corporations, or well to do defendants, in actions where a woman or a poor unfortunate happens to be plaintiff.

I think "good cause," a phrase which I have adopted from the Judicature Act, should always be shown, or that the costs should follow the event. *Wallace v. Allen*, L. R. 10 C. P. 607, may be referred to.

GALT, C. J., and MACMAHON, J., concurred.

Costs accordingly.

VILLENEUVE V. WAIT.

Judgment under Rule 80—Writ of summons—Special indorsement.

The writ of summons was indorsed as follows: "The plaintiff's claim is for \$213.90, balance due for sawing wood by the plaintiff for the defendant."

Held, not a sufficient special indorsement to admit of the plaintiff moving for judgment under Rule 80.

[May 28, 1888.—*Street*, J.]

THIS was a motion by the defendant by way of appeal from an order made by the local Judge at Cornwall, permitting the plaintiff to enter judgment under Rule 80.

The question raised was as to the sufficiency of the indorsement upon the writ of summons, which was in the following words: "The plaintiff's claim is for \$213.90, balance due for sawing wood by the plaintiff for the defendant."

The appeal was argued 25th May, 1888, before a Judge in Chambers.

Aylesworth, for the appeal.

H. Symons, contra.

STREET, J.—I must hold that this is not a good special indorsement: a writ of summons can be specially indorsed only where the claim is a debt or liquidated demand in money, and the special indorsement must then shew "the *particulars* of the amount sought to be recovered after giving credit for any payment or set-off." No particulars are here given either of the original claim, or of any payment or set-off by which it is reduced to the balance claimed, and it does not appear that the balance claimed has been stated or agreed upon, which might perhaps excuse the absence of particulars.

The indorsement here appears to follow the forms given in the rules for the indorsement of writs which are not, rather than those for the indorsement of writs which are, intended to be specially indorsed.

As judgment under Rule 80 can only be ordered where the writ has been specially indorsed, I think the appeal must be allowed with costs, and the order of the local Judge set aside with costs. The costs to be costs to the defendant in any event. See *Walker v. Hicks*, 3 Q. B. D. 8; *Parpaite v. Dickinson*, 38 L. T. N. S. 178; *Fitzsimmons v. Wilson*, 4 C. L. T. 91; *Lucas v. Ross*, 9 P. R. 251; *Aston v. Hurwitz*, 41 L. T. N. S. 521.

NORTON V. MCCABE.

County Courts—Term motion—Time for making—R. S. O. (1887) ch. 47, secs. 29, 41—Rule 488.

Reading sec. 41 with sec. 29 of the County Courts Act, R. S. O. (1887) ch. 47, and having regard to the provisions of Rule 488, *Held*, that a party may move before the Judge in Court against the verdict or judgment at the trial either *before*, or during the first two days of the next quarterly sittings after the trial. The motion is not necessarily to be made at the usual fixed sittings; the Judge may entertain it at any previous time.

Scope of sec. 42, sub-sec. 5, R. S. O. (1887) ch. 47, as to moving before the County Court to set aside the judgment at the trial, observed on.

Smith v. Rooney, 12 U. C. R. 661, is not applicable to the existing law and practice.

[May 29, 1888.—*The Court of Appeal.*]

THIS case was tried before the Judge of the County Court of Grey with a jury at the December, 1887, sittings of the Court for the trial of issues. Certain questions were left to the jury, which they answered, and upon the answers and upon other facts which appear to have been assumed, a verdict was given for the plaintiff for \$104.53, "with leave to the defendant to move to set it aside" and enter judgment for the defendant. The plaintiff moved for judgment, and judgment was directed to be entered in his favour on the third day of "term" if no previous motion was made by defendant.

A motion was made by the defendant accordingly, which was dismissed, and from the decision thereon an appeal

was brought before this Court. The plaintiff now moved to quash the appeal on the ground that the judgment was a mere nullity and not appealable, the motion and order *nisi* having been made and argued at a time not within one of the statutory quarterly sittings in lieu of term.

The motion was argued on the 28th May, 1888, before Hagarty, C.J.O., Burton, Patterson, and Osler, JJ.A.

C. J. Holman, for the motion.

George Bell, contra.

Judgment was given on the 29th May, 1888.

OSLER, J.A.—In the Court below all parties appear to have overlooked the fact that by 50 Vic. ch. 8, sched. p. 25, (O.) it was provided that the January sittings of the County Courts in lieu of term should thereafter commence on the second Monday instead of the *first* Monday, in January, as formerly. Accordingly a sitting of the court was held during the week commencing on the first Monday in January. The defendant gave notice of motion to set aside the findings of the jury and the judgment directed to be entered thereon, and to enter a non-suit or judgment for defendant, for the 4th January, 1888. On the 3rd January an order *nisi* was granted by the Judge in Court for the same purpose. The motion and order *nisi* were argued on the 6th January, and judgment was reserved until the 26th January, when both were discharged.

The case of *Smith v. Rooney*, 12 U. C. R. 661, was decided upon the County Courts Act, 8 Vic. ch. 13; sec. 43 of which enacted that no motion for a new trial should be entertained after the rising of the Court on the second day of term; and sec. 42, that judgment might be entered on the verdict on the third day of term.

It was held that in the face of the express prohibition of the statute, a judgment regularly entered could not be set aside in the vacation after term, pursuant to an

arrangement between the County Judge and the Bar that all term business might be transacted in vacation.

In the Revised Statutes of 1877 ch. 43, sec. 30, taken from C. S. U. C. ch. 15, sec. 19, the provisions of the Act of 12 Vic. are modified thus: sec. 30, the several County Courts may, *in term time*, by rule, &c., set aside verdicts or non-suits, grant new trials, and make orders for judgment *non obstante*, or for arresting judgment, &c.: and by sec. 12, the Judges of the several Courts may, during each term, appoint one or more days within the fortnight next following the last day of the term, on which judgments will be given; and on the day appointed Judges may sit for that purpose only, &c., and judgments then pronounced shall have the same force and effect as if given in term.

Rule 488 of the Judicature Act of 1881 enacts that subject to rules of Court, the Judges of the County Court shall have power to sit and act *at any time* for the transaction of any part of the business of such Courts, or for the discharge of any duty which by any statute or otherwise was formerly required to be discharged out of or during term.

In consequence of this rule, sec. 12 of the revised Act of 1877, *supra*, as to appointing a day for giving judgments after term, was omitted from the revision of 1887. See table, Vol. II. p. 2689.

And presumably for the same reason, sec. 30 of the revised Act of 1877 appears in the revision of 1887, ch. 47, sec. 29, with the omission of the words "in term time" and reads thus, generally: "The several Courts may set aside verdicts or non-suits, and grant new trials," &c., &c.

This is in the group of sections headed "Pleading and Practice."

Under another group entitled "Appeals from County Courts" we have sec. 41, sub-sec. 2 of which enacts that "instead of appealing to the Court of Appeal either party may, in cases tried by a Judge, move before the County Court, within the first two days of its next quarterly sittings, for a new trial, or to set aside the judgment on any ground

except that upon the evidence given, the judgment, so directed, is wrong in law"; and by sub-sec. 3, "In cases, tried with a jury (which is the case here) instead of appealing to the Court of Appeal, *a similar motion may be made* before the County Court for a new trial, or to set aside the judgment directed to be entered upon the special findings, upon any ground, *except that the judgment so directed to be entered is wrong in law.*"

Sub-sec. 5 seems inconsistent with these sub-sections to some extent, as it provides that when a party is entitled to move before the County Court under sub-secs. 2 and 3, *he may move upon all the grounds which would be open to him if he were appealing to the Court of Appeal (and therefore on the ground that the judgment directed is wrong in law)*: sec. 41, sub-sec. 1.

Reading sec. 41 with sec. 29, I think it cannot be held that the party is restrained by the former to move in term time, *i. e.*, during the first two days of the next quarterly sittings; that limits a time after which he has no right to move; but he may, I think, by force of the other sections, move before the Judge in Court, if the Judge chooses to hear him, at any time after judgment has been given, just as in cases in the High Court he might move before a Divisional Court whenever it happened to be sitting, even if that was not one of the usual fixed sittings of the Court.

The case of *Smith v. Rooney* is, therefore, in my opinion, not applicable to the existing law and practice, and the appeal in this case is properly constituted.

The motion to quash the appeal will, therefore, be refused, and, as the parties did not call the attention of the Court to Rule 488, there will be no costs to either of them.

HAGARTY, C. J. O., and BURTON and PATTERSON, JJ. A., concurred.

Motion dismissed.

The Court afterwards heard the appeal, and dismissed it on the merits.

LALLY V. LONGHURST ET AL.

*Parties—Mortgage action—Postponement of incumbrance prior to mortgage
—Question of priority, how determined.*

C. recovered judgment against L. in 1882, and placed a *fi. fa.* lands in the sheriff's hands, which had ever since been regularly renewed; in 1883 L. bought land from the plaintiff, giving back a mortgage for the purchase money. Under a judgment for foreclosure recovered upon that mortgage, C. was added as a subsequent incumbrancer in the Master's office, and appealed.

Held, that C. was not properly added as a party in the Master's office; that the plaintiff was only entitled to have the claim to postpone the execution to the mortgage tried at the hearing.

But the plaintiff was allowed, following *Glass v. Freckleton*, 10 Gr. 470, to set aside his judgment, add C. as a party, and amend so as to raise the question of priority.

[June 13, 1888.—*Street, J.*]

MOTION by defendant Constable to set aside an order of the local Master at Barrie adding him as a party defendant in his office under a foreclosure judgment. The motion was argued before Street, J., in Court on the 12th June, 1888.

Hewson, for the motion.

Radenhurst, contra.

The facts appear in the judgment.

STREET, J.—One Holt recovered judgment against the defendant Longhurst in 1882, and placed execution in the sheriff's hands against his lands; this execution has ever since been regularly renewed. Holt is dead, and Constable is his administrator. In 1883, while execution was in the sheriff's hands, Longhurst purchased the land in question from the plaintiff, and gave back to him a mortgage upon it for a part of the purchase money. The mortgage was not paid, and the mortgagee brought an action against the mortgagor and obtained the ordinary foreclosure judgment, which he has carried into the Master's office. There he appears to have become aware for the first time of the existence of the prior execution, and upon his application

the Master added Constable as a subsequent incumbrancer under Chancery Orders 442, 443, 444.

I do not think it necessary that I should discuss the question as to whether or not the plaintiff is entitled to insist that the claim of the judgment creditor is to be postponed. The execution is prior in point of time to the plaintiff's mortgage, and if the plaintiff seeks to have it postponed, he is not entitled to have the question disposed of in the Master's office or upon motion, without the defendant's consent. The defendant is entitled to have the question tried at the hearing of the action.

I think the order of the Master making Constable a party must be set aside with costs, and that this motion should be allowed with costs; but following the course adopted in *Glass v. Freckleton*, 10 Gr. 470, I allow the plaintiff, if he desires to do so, to take out an order setting aside his judgment and adding Constable as a party to the action, and he may then make all such amendments in his proceedings as he may be advised in order that the question may be determined as to whether or not he is entitled to have Constable's execution postponed.

COUSINEAU V. CITY OF LONDON FIRE INSURANCE CO.

Costs "as between solicitor and client"—Mistake—Effect of accepted offer—Release.

A party cannot be released from an offer, deliberately made to and accepted by the opposite party, on the ground that his offer turns out to have some different effect from what he supposed it would have.

Costs "as between solicitor and client" in an action include such costs as a solicitor can tax against a resisting client under the general retainer to prosecute or defend the action.

[June 29, 1888.—*Armour*, C. J.]

THE judgment of the Queen's Bench Division on a special case submitted in this action is reported 15 O. R. 329. After that judgment, and when the defendants were appealing from it to the Court of Appeal, the plaintiff offered to consent to the judgment and special case being set aside, and to go down to trial in the ordinary way, upon payment of his (the plaintiff's) costs incurred in respect of the special case, "as between solicitor and client." The defendants agreed to this, and by consent an order was made by Street, J., in Court, setting aside the judgment &c., upon the terms agreed upon.

Upon coming into the taxing office to tax his costs "as between solicitor and client," the plaintiff discovered that, according to the practice of the taxing office, the full costs taxable by the solicitor against his client would not be allowed under the words "as between solicitor and client"—the scale applicable under these words being very little higher than party and party costs.

The plaintiff accordingly moved to vary the order of Street, J., by striking out the word "as," or to set it aside altogether and leave the parties where they were before the order.

The motion was heard by *Armour*, C. J., in Court on the 26th June, 1888.

Aylesworth, for the motion.

C. Millar, contra.

Judgment was delivered on the 29th June, 1888.

ARMOUR, C. J.—I do not think I can interfere to release the plaintiff from his offer deliberately made to and accepted by the defendants, on the ground that his offer, turns out to have some different effect from what he supposed it would have: *Powell v. Smith*, L.R. 14 Eq. 85; *Midland & G. W. R. v. Johnson*, 6 H.L.C. at p. 811. The costs in an action as between solicitor and client include, in my opinion, such costs as a solicitor can tax against a resisting client under the general retainer only to prosecute or defend the action.

The motion must be dismissed, with costs.

RE WHITE V. GALBRAITH.

Mandamus—Division Court—Abandoning excess of claim at trial—Discretion.

General Rule 8 of the Division Courts provides that when the excess of a claim is abandoned to bring the amount within the jurisdiction, it must be done in the first instance on the claim.

Held, that this rule does not prevent the Judge before or at the trial from permitting the plaintiff to amend his claim upon such terms as he thinks fit; and General Rule 118 and section 304 of the Division Courts Act afford ample authority for permitting such amendment; but the Judge cannot be compelled by *mandamus* to exercise his discretion to permit an amendment.

[June 29, 1888.—*Armour*, C. J.]

A MOTION by the plaintiff for a *mandamus* to compel the Junior Judge of the County Court of the county of York to hear a plaint in one of the Division Courts of the county.

The claim of the plaintiff as entered in the Division Court was above the amount over which the Court had jurisdiction; but the plaintiff at the trial asked leave to amend by abandoning the excess of his claim, and, this being refused, now moved for the *mandamus*.

The motion was heard by ARMOUR, C. J., in Chambers, on the 26th June, 1888.

Hands, for the motion.

C. J. Holman, contra.

Judgment was delivered on the 29th June, 1888.

ARMOUR, C. J.—There is nothing in the Division Courts Act prescribing the time when the plaintiff is to “abandon the excess”; but General Rule 8 provides that when the excess is abandoned it must be done in the first instance on the claim.

There is nothing in this rule to prevent the Judge permitting the plaintiff to amend his claim at any time before or at the trial upon such terms as he shall think fit.

General Rule 118 and sec. 304 of the Division Courts Act afford ample authority to the Judge to permit the plaintiff to so amend; and the Judge would, in my opinion, have exercised a wise discretion in permitting the plaintiff to so amend. This is a discretion, however, which I cannot enforce by *mandamus*.

The motion must be dismissed, but without costs.

ALPHA OIL CO. V. DONNELLY.

Writ of replevin—Direction of to sheriff who was also liquidator of plaintiffs—Irregularity—Waiver—R. S. O. (1877) ch. 53, sec. 9.

In a replevin action the writ was directed to a sheriff who was the sole liquidator of the plaintiffs, and as such instituted the action.

Held, that this was at most an irregularity, and it was too late for the defendant to raise the objection after appearance.

R. S. O. (1877) ch. 53, sec. 9, applies to the case of an application on the merits, and not for irregularity only.

Quere, whether, even if the objection had been taken in time, it should have prevailed, having regard to the kind of duty the sheriff has to perform in executing a writ of replevin, and to the position of the liquidator as a mere officer under the Act.

[June 29, 1888.—*Armour, C. J.*]

JAMES FLINTOFF was the sole liquidator of the plaintiff company, appointed under R. S. C. ch. 129. He was also the sheriff of the county of Lambton. On the 1st of June, 1888, the Judge of the County Court of the county of Lambton, on the motion of the said liquidator, ordered that a writ of replevin should issue out of the High Court directing the sheriff of the county of Lambton to replevy to the plaintiff company certain goods of the plaintiff company then in the possession of the defendant, and fixed the security at \$1,500. On the 1st June, 1888, the said writ of replevin was issued directed to the sheriff. The sheriff having taken a bond, as by law required, served the defendant on the 2nd June, 1888, with a copy of the writ of replevin, and on the 4th June, 1888, replevied the said goods. On the 9th June, 1888, the defendant appeared to this action. On the 11th June, 1888, the defendant gave notice of motion for an order setting aside the order of the Judge of the County Court of the county of Lambton dated the 1st June, 1888, with costs, and for an order setting aside with costs the writ of replevin issued herein on the 1st June, 1888, upon grounds disclosed in the affidavits of the defendant and his solicitor filed in support of the motion.

On the 26th June, 1888, the motion was argued before ARMOUR, C. J., in Chambers.

Aylesworth, for the motion.

C. J. Holman, contra.

Judgment was delivered on the 29th June, 1888.

ARMOUR, C. J.—The objection taken to the Judge's order and to the writ of replevin was that the order required the writ of replevin to be directed to, and the writ of replevin was directed to, the sheriff of the county of Lambton, who was the sole liquidator of the plaintiff company, and that the order and writ were made and issued at the instance of the said liquidator, who, by virtue of R. S. C. ch. 129, sec. 30, "upon his appointment, shall take into his custody or under his control, all the property, effects and choses in action to which the company is or appears to be entitled;" and so the sheriff, in executing the writ, virtually replevied the goods to himself as liquidator.

The direction of the writ to the sheriff, under the circumstances, was at most but an irregularity, and should have been moved against before the defendant appeared to it, and it is too late after appearance to raise the objection.

In *Weston v. Coulson*, 1 W. Bl. 506, in an action by the sheriff against one of his bailiffs, the application was made to set aside the proceedings because the *latitat* was directed to the sheriff himself, and not to the coroners. The application was made before appearance, and the direction of the *latitat* was held to be irregular.

In *The Mayor of Kingston upon Hull v. Bubb*, 1 Dowl. 151, an application was made to set aside the proceedings for irregularity, on the ground that the *latitat* was directed to the sheriff, who was one of the plaintiffs, and the Court held the process regular.

In *Done v. Smethier and Leigh*, Cro. Car. 416, error was brought because the writ of covenant was directed to the coroners instead of to the sheriff, because Done was sheriff, and the Court said: "But when it is awarded to

the coroners, if the defendant would have excepted against it (as peradventure he might in some cases), yet when he appears and accepts thereof, and comes and levies a fine thereunder, he never afterwards shall assign for error, that the writ ought not to have been directed to the coroners."

In *Gilchrist v. Conger*, 11 U. C. R. 197, the application was to set aside the writ of replevin for irregularity in directing it to the coroners instead of to the sheriff, who was the defendant.

R. S. O. (1877) ch. 53, sec. 9, applies to the case of an application for the relief thereby prescribed on the merits, and not to an application on the ground of irregularity only.

If the objection taken had been taken in time, it may well be doubted if it would have prevailed, having regard to the kind of duty the sheriff has to perform in executing a writ of replevin, and having regard to the position of the liquidator as a mere officer appointed under the Act to fulfil the duties thereby prescribed.

In addition to the cases cited above, I refer to *Viner's Abridgement*, *Sheriff P. and Q.*, and *Letsom v. Bickley*, 5 M. & S. 144, where most of the ancient law on the subject or references thereto may be found.

The motion will be dismissed, with costs.

DISHER V. DISHER.

Writ of attachment—Setting aside—Jurisdiction of County Court Judge in High Court action.

The Judge of a County Court who orders the issue of a writ of attachment out of the High Court under sec. 2 of the Absconding Debtors' Act, R. S. O. (1877) ch. 66, has no jurisdiction to entertain an application to set aside such writ.

[June 29, 1888.—*The Common Pleas Division.*]

THE Judge of the County Court of Lincoln made an order for the issue of a writ of attachment under the Absconding Debtors' Act, and the defendant moved before the same Judge to set aside the writ, which he refused to do.

An appeal by the defendant from the order refusing such application was heard and allowed by Galt, C. J., in Chambers; and the plaintiff now appealed from the order allowing the defendant's appeal.

The appeal was argued on the 22nd May, 1888, before a Divisional Court composed of ROSE and MACMAHON, JJ.

Aylesworth and Lancaster, for the appeal.

W. M. Douglas, contra.

Judgment was delivered on the 29th June, 1888.

ROSE, J.—This was an appeal from the order of the learned Chief Justice of this Division allowing an appeal from the order of His Honour Judge Senkler, dismissing an application to set aside a writ of attachment, issued under an order made by himself under the Act respecting Absconding Debtors, ch. 66, R. S. O. (1877.)

I do not think the learned County Court Judge had jurisdiction to entertain the application to set aside the writ of attachment. Section 2 of the Act provides that the Judge of a County Court may order a writ of attachment to issue from the High Court, but there is no provision for his hearing any further application in the matter.

It is not necessary to consider whether under the Judicature Act a motion to set aside the writ, without attacking the order, can be made to a Judge sitting in Chambers, as decided in *Jackson v. Randall*, 6 P. R. 165; 24 C. P. 87. The doubt of Cameron, J., in *Kyle v. Barnes*, 10 P. R. 20, may be noted.

The learned County Court Judge, therefore, was quite right in refusing to interfere with his first order, and although the ground given by him was upon the merits, his refusal was none the less right; as, in my opinion, he had no jurisdiction to entertain the application.

The appeal from such order, therefore, should not have been allowed; as, if he made any order at all, it was the only order he could have made.

The notice of appeal to the learned Chief Justice contained an alternative by way of notice of motion to set aside the writ; but no order was made thereupon.

We are now asked to entertain the application as an original one upon that ground of the notice of appeal.

If we have the jurisdiction to do so, I should feel quite unable to interfere with the order or writ, as I think they were issued upon facts which well warranted the learned Judge in making the order, and nothing has been made to appear to cause me to interfere on any facts since stated.

But this appeal is by the plaintiff from the order of the learned Chief Justice granting the appeal from the order of the learned Judge of the County Court, and is not an appeal by the defendant on the ground that the learned Chief Justice did not entertain the application on the alternative ground, viz., by way of original motion to set aside the writ.

If, therefore, we should now act on that ground, we should in the Divisional Court be entertaining a motion which should have been made to a Judge in Chambers and not to the Divisional Court, and this we should not do.

I think this appeal should be allowed on the ground that the learned County Court Judge had no jurisdiction to entertain the motion to set aside the writ, and therefore

that the appeal from his order refusing to set aside the writ should not have been allowed.

The appeal will be allowed with costs in the cause to the plaintiff in any event, and the effect will be that the original order and the proceedings founded thereon will stand.

MACMAHON, J., concurred.

Appeal allowed.

SMITH ET AL. V. FLEMING ET AL.

Costs—Covenant for renewal lease, construction of—Costs of lease—Costs of reference and award—Costs of action for arbitrators' fees.

It was provided in a lease that if the lessee should desire a renewal for a further term and give a defined notice, containing the name of an arbitrator, the lessors, at the expense of the lessee, should execute a new lease at such increased yearly rent as might be determined by the award of three indifferent arbitrators, or a majority of them.

Held, that the costs of the lease were provided for both by law and by the above clause, and must be borne by the lessee; but that the costs of the arbitration were not provided for by the clause, and each party must bear his own costs of the reference, one-half of the arbitrators' fees, for which the action was brought, and one-half of the plaintiffs' costs of the action.

[June 19, 1888.—*Ferguson, J.*]

AN action for arbitrators' fees tried before Ferguson, J., at the Toronto Chancery Spring Sittings, 1888.

The facts appear in the judgment.

A. C. Galt, for the plaintiff.

S. H. Blake, Q. C., and *Tilt*, Q. C., for the defendant Fleming.

Arnoldi, for the defendants the Rector and Churchwardens of St. James's Church, Toronto.

FERGUSON, J.—The defendant Fleming is the lessee of certain lands in Toronto, and the other defendants the Rector and Churchwardens are lessors under an indenture

of lease. The time having arrived for a renewal of the lease, the lessee elected pursuant to certain provisions in the original lease to have a renewal lease, and gave the required notice in this behalf; whereupon and according to the provisions contained in the original lease, an arbitration took place for the purpose of fixing the amount of the increased yearly rent to be reserved by the renewed lease for the term or period of twenty-one years.

The plaintiffs were the arbitrators. Their fees as such arbitrators were, as was said, duly taxed under the provisions of the statute, and amount to the sum of \$718. These fees have not been paid, and the plaintiffs bring this action for the recovery of them (with interest) against all the defendants.

At the trial it was conceded that the plaintiffs are entitled to recover against both defendants this sum of \$718, with interest on the same from the proper date, as well as their costs of this action.

This judgment will therefore be pronounced in the plaintiffs' favour.

The contention that took place was between the defendants. The Rector and Churchwardens claim that Fleming is alone liable to pay the plaintiffs' claim, and that he is also liable to pay their (the Rector and Wardens') costs of the arbitration, amounting, as said in the pleading, to some \$600, and the costs incurred in and about the preparation, execution, and tender of the renewal lease, and should indemnify them against the plaintiffs' claim, and the costs, charges, and expenses of and incidental to the reference and award and all other costs of and incidental to the renewal lease.

The defendant Fleming makes a similar, or nearly similar, claim against his co-defendants, excepting that he has been always ready and willing and offers to pay the costs incurred about the preparation of the lease.

An order was made in Chambers directing that the issues raised between the defendants should be tried at the trial of the action. Hence the contention between the defendants.

The difficulty arises chiefly by reason of a difference of opinion as to the meaning of and the proper construction to be given to a clause contained in the lease from the Rector and Churchwardens to one Thomas Cunningham, bearing date the 18th October, 1866, of the premises in question, and of which through mesne assignments the defendant Fleming was assignee. This clause has reference to a renewal of the lease, and is as follows :

“ And the said lessors, as such Rector and Churchwardens as aforesaid, covenant with the said lessee for quiet enjoyment. And also, that if the said lessee, his executors, administrators, and assigns, shall desire a renewal of this lease for a further term of twenty-one years, and shall give to the lessors, as such Rector and Churchwardens as aforesaid, or their successors, three months' notice in writing thereof, immediately previous to the expiration of this present term, and which said notice shall contain the name of an arbitrator to act as hereinafter set forth, that they the said lessors or their successors shall and will, at the expense of the lessee, his heirs, executors, administrators, or assigns, execute a new lease of the said premises to him and them for such further term of twenty-one years, with the like covenants, provisos, and conditions as are contained in these presents, save the covenant for the renewal thereof, and at such increased yearly rent as may be determined by the award of three indifferent arbitrators, or of the majority of them : such arbitrators to be chosen as follows : one by each of the said parties to these presents, their heirs, executors, administrators, successors, or assigns ; and the third by the said other two so chosen as aforesaid,”

The Rector and Churchwardens contend that the whole expense of the renewal lease and of the arbitration (the latter a very large sum indeed) should be borne and should have been paid by Fleming, and that as a consequence he should also be ordered to pay the plaintiffs' claim and their costs of this action, as well as all his own costs, which, as was said at the bar, amount in all to a sum exceeding \$2,000. For this contention they rely upon the words in the clause “ at the expense of the lessee, his heirs,” &c., and besides, they contend that even if these words were not in the

clause, the meaning would be the same. They further contend that the insertion of the clause, "at the expense of the lessee," &c., inasmuch as it was unnecessary, so far as the expense of the lease itself was concerned, the rule being in ordinary cases that the lease is drawn by the solicitor for the lessor, and the costs of it charged to the lessee (that is where there is no provision or agreement on the subject), shews, or at least indicates, that the meaning is that the costs of the arbitration, as well as of the lease, are to be borne by the lessee. This last contention is, I think, met by the note in the 5th vol., part 2, of *Davidson's* Precedents, p. 29, where it is said that the clause merely expresses the ordinary rule of law; but as lessees, when the agreement is silent upon the point, frequently object to bearing the whole expense of the lease, it seems desirable to avoid questions by inserting the clause. It is, therefore, I think, probable that even if there had been no arbitration mentioned or contemplated at all, this clause would have been found in the document.

The covenant or clause in the lease over which the contention is, so far as it bears directly upon the immediate point in dispute, when stripped of the words shewing the character of the lessors, the words referring to successors and representatives, and other words not material to the meaning so far as the immediate point in dispute is concerned, may be read, I think, shortly in this way: *And also that if the lessee shall desire a renewal of this lease for a further term of twenty-one years, and shall give the notice mentioned and defined, then that the lessors shall and will, at the expense of the lessee, execute a new lease to him for such term of twenty-one years, at such increased yearly rent as may be determined by the award of three indifferent arbitrators, or a majority of them.* And I do not perceive that the necessity that the lessee should name his arbitrator in the notice to be given by him, can add or subtract anything from this, so far as the point in dispute is concerned.

The question raised presents, to me at all events, some difficulty, but looking at it fairly, and with the best consideration I can give it, I am of the opinion that the costs of the lease are provided for both by law and by the contract, but that the costs of the arbitration are not provided for by the contract. Then assuming this to be so, what is the consequence? The nearest analogy that I have seen is the one referred to by counsel for the defendant Fleming, and is found in the 6th ed. of *Russell on Awards*, at p. 381. It is stated in this way:

“When a cause alone or a cause, and all matters in difference are referred, and nothing is said in the submission respecting costs, the arbitrator has an implied authority to adjudicate respecting the costs of the cause, but not of the reference or award, and each party must bear his own expense of the reference, and is liable to half the costs of the award.”

It is true that this statement is given under the caption or heading, “*The power of the arbitrator over costs*,” but it nevertheless states what is the proper disposition to be made, or rather what is the rule of law in regard to the costs of a reference and award, where the submission is silent in regard to them, which, as I have already said, the submission in the present case in my opinion is. The same rule is found in *Marshall on Costs*, pp. 430, 431, under the heading: “*Where reference silent as to costs*.”

It was contended that the lessee in order to avail himself of the benefits of the clause or covenant in question, must tender a lease for execution; that he could not put the lessors in default without so doing; that to do this he would be obliged to ascertain the amount of the yearly rent to be reserved by the renewed lease; that there was only the one way of doing this; and that as a consequence he would be obliged to undertake and pay the expenses of the arbitration and award, which shewed that the meaning in this respect of the clause or covenant is, that all these expenses were to be borne by the lessee, and cases were referred to as supporting their contention.

Now, although the authorities seem to show that the Courts will not entertain actions for the specific performance of contracts to refer to arbitration, I do not think that the lessee was by this contract in the position indicated above. There existed a contract that the amount of increased rent to be reserved should be determined by three arbitrators, one to be chosen by each party to the contract, and one by the two so chosen, and it appears to me that if the lessors were unwilling and declined to arbitrate, they could be compelled to do so under the provisions of sections 215 and 216, ch. 56, R. S. O. (1877), which are, I think, sections 39 and 40, ch. 53 R. S. O. (1887), and there would in this way be an arbitration under a reference, silent as to the costs of it, by which the amount of the rent to be reserved would be ascertained.

I am, as I have said, of the opinion that the costs of this arbitration are not provided for by the document of reference, that is the covenant in question, and it follows, I think, that the defendants should each bear and pay his and their costs of the reference; that each should pay one half of the arbitrators' fees for which this action is brought; that each should pay one half of the plaintiffs' costs of this action; that each should bear and pay his and their own costs of this action; and that, as conceded, the defendant Fleming should pay the costs of the renewed lease. This seems to me to be the proper conclusion, and the judgment as between the defendants will be accordingly.

The judgment in favour of the plaintiffs I have before mentioned.

If any question arises between the defendants as to the indemnity mentioned in the pleadings, it may, if necessary, be spoken to on settling the minutes of the judgment.

MERCHANTS BANK V. LUCAS ET AL.

Evidence—Adducing additional evidence in Court of Appeal.

The defendants, appealing from a Divisional Court, applied for leave to adduce further evidence in the Court of Appeal to corroborate that already taken upon a point which was argued before the Divisional Court, and decided adversely to the applicants. The application was refused.

Remarks on the reception of further evidence by appellate Courts.

[May 8, 1888.--*The Court of Appeal.*]

MOTION by the defendants for leave to adduce further evidence upon their appeal to this Court from the judgment of the Common Pleas Division, 13 O. R. 520.

The motion was argued before HAGARTY, C.J.O., BURTON, PATTERSON, and OSLER, J.J.A., on the 12th April, 1888.

McCarthy, Q.C., for the motion.

Robinson, Q.C., contra.

BURTON, J. A.—Among all the improvements made in legal procedure in recent years, none, not even the abolishment of special demurrers, can at all compare with the beneficial changes made both in the law of evidence, and the facilities now given for admitting it at any stage of the cause in furtherance of justice and with the view to get at the matter in dispute; and yet strange to say these changes met with more determined opposition than almost any other.

It is now thirty-seven years since the statute passed allowing the parties to the suit to give evidence, but the Act met with such strong opposition in quarters where one would have least expected it—from the judiciary amongst others—and such a strong pressure was brought to bear upon the Government that within two years it was repealed, and for seventeen long years the former system, under which the parties best acquainted with the facts were excluded, and Courts and juries compelled to grope to

a conclusion upon such meagre evidence as could be obtained from others, continued to be the law of the land.

That day has fortunately gone by, and in much more recent times facilities have been given for taking evidence at almost any stage of the cause.

But I quite agree that it would not conduce to the ends of justice to allow parties to lie by, argue the case, and take the chance of a judgment in their favour upon the material before the Court, and after judgment against them, apply to be allowed to give further evidence.

The same reasoning which induced the Court to grant new trials upon the discovery of fresh evidence with extreme caution, applies to the receiving of fresh evidence in the Divisional Courts, and even more so in this Court. The evidence proposed to be given is not evidence of that character, but is evidence to corroborate or strengthen that already before the Court, upon the same point which was argued before the Divisional Court. That was the proper time to apply for leave to offer the further evidence, if then taken by surprise; and I concur in the view that it would be establishing a dangerous precedent to receive it in this case.

PATTERSON, J. A.—An appeal from the judgment of the Common Pleas Division, which is reported in 13 O. R. at p. 520, is shortly to be heard before this Court, and the defendants have asked for leave to adduce further evidence.

The action is by the indorsees of a bill of exchange against the drawers, who deny the drawing, alleging that their signature is a forgery.

The defendants had judgment in their favour at the trial, which was without a jury, the forgery being found as a fact. The Divisional Court reversed the judgment, not disapproving of the finding of forgery, but holding by a majority that the defendants had by their conduct estopped themselves from disputing their liability.

The report of the case shews that the question of estoppel or ratification was fully argued before the Divisional Court, and the evidence bearing upon it was discussed in the judgments delivered.

The time at which the plaintiffs became aware that the defendants disputed the genuineness of the bill is considered to be a fact of importance, and it is mainly upon that subject that we are asked to receive evidence.

We know from the affidavits read on the argument the nature of the evidence offered.

It relates to interviews and conversations respecting which witnesses were examined at the trial, when they gave evidence that was quoted and commented on in the judgments in the Court below. On the part of the defendants a gentleman who was one of their counsel before the Divisional Court, and I suppose also at the trial, proposes to give his recollection of matters that were equally within the knowledge of another gentleman who occupies precisely the same position with regard to the plaintiffs, but whose recollection of the matters is very different; and this conflict of evidence is to be extended by corroborative testimony on each side.

Apart from other objections, it is plain that evidence such as this, which is merely additional evidence on matters that have been pronounced on, either at the trial or in the Divisional Court, where one of the Judges was the Judge before whom the trial was had, could not be satisfactorily dealt with by a separate tribunal, but, if received at all, ought to be given at a new trial, when all the evidence on each issue could be considered together.

The evidence, not being newly discovered evidence, could not be made the ground of a rule for a new trial under the familiar practice in jury cases. That circumstance alone might not preclude its reception under the present useful extension of the powers of our appellate Courts, whether this Court or the Divisional Courts, by which in a large class of cases the necessity for a new trial is done away with, but it is a circumstance not without influence against the application.

It would be unwise to attempt to define the cases in which fresh evidence ought or ought not to be received, and I have no intention to make the attempt.

We have in this Court in several cases received fresh evidence, sometimes by the examination of witnesses in open Court, and we have in other cases refused to allow new evidence to be adduced. Each case must be dealt with by itself.

I have not made any effort to trace the English practice, but I have happened to note two instances in which the Court of Appeal allowed new evidence to be given, in both of which there are dicta which are not encouraging to such applications as this.

Boswell v. Coaks, 27 Ch. D. 424, was tried before Mr. Justice Fry, who, upon the plaintiff's evidence, dismissed the action. The plaintiff appealed, and the defendant asked that if the Court did not decide in his favor he might give evidence. Baggallay, L. J., said, (p. 430): "We consider that it would not be right for us to decide the case upon the present materials, and then allow you to call evidence if our decision is against you. If the defendants elect to call witnesses we will hear them."

The analogy here is in deferring the application till after the decision of the Divisional Court upon the evidence given at the trial.

In *Evans v. Benyon*, 37 Ch. D. 329, the appeal was by the defendants, who were allowed, under the circumstances of the case, to give evidence which had been volunteered since the trial by the plaintiff's wife, the last person to whom they could have thought of applying for it. Lord Justice Cotton gave the judgment of the Court, reversing the judgment below, and added (p. 345): "The appellant, however, must pay the costs of the motion to be allowed to adduce further evidence, which we allowed in this case, considering it a very special case, and not in any way departing from our rule, to which I adhere very strongly, that parties ought not to be allowed to bolster up their case by adducing fresh evidence before the Court of Appeal."

I shall say no more on the subject of this application, but it may not be out of place to make a general remark or two.

When a party, plaintiff or defendant, decides at a trial not to call witnesses, relying upon the view of his adversary's case which the Judge may have expressed, it is of course open to the appellate court in its discretion to hear his evidence, or to send the case back for a new trial. This was pointed out by Jessel, M. R., in *Ex parte Jacobson*, 22 Ch. D. 312, 315. But I would caution practitioners against relying on *Boswell v. Coaks* as an authority for insisting upon doing in the Divisional Court or in this Court what they took the risk of not doing at the trial. The power to receive fresh evidence ought, no doubt, to be exercised with judicious liberality in furtherance of justice, and for the avoiding of unnecessary delay and expense. To a certain extent it converts the appellate court into a court of first instance; but it is meant to be rather supplementary to the courts of first instance, where a proper case for its exercise appears, than to relieve litigants from the duty of bringing their facts fully before those courts. In *Boswell v. Coaks* the leave was not given as a matter of course. Lord Justice Baggallay stated in delivering judgment, (p. 452) that the court had deemed it right, at the close of the appellant's case, to intimate to the respondent's counsel that upon the materials before the court there was a case to be answered. The judgment at the trial had proceeded upon the Judge's view that by reason of certain proceedings the fiduciary relationship on which the plaintiff relied had ceased. The Lords Justices considered that the rights in litigation turned on other considerations and not on the question decided by Mr. Justice Fry, whose opinion, by the way, was afterwards sustained in the House of Lords, (11 App. Cas. 232.) The new evidence was on a different issue from that on which the decision in the first instance went.

We considered one aspect of this subject in *Macdonald v. Worthington*, 7 A. R. 563. I refer to what was there

said by myself and by Chief Justice Spragge, particularly to the remarks of the Chief Justice, where he pointed out the inconvenience and disadvantage which would be entailed upon the plaintiff by having his case decided by a Judge who had not heard his evidence, as well as by having disclosed his case to his adversary. I have not seen any reason to change the opinions expressed in that case.

I am satisfied that we ought to refuse the present application, and of course, with costs.

OSLER, J. A.—I think this is not a case in which we should exercise the power of the Court to admit further evidence. The evidence now sought to be admitted is such as, having regard to the nature of the defence, might reasonably have been offered at the trial. It was then known to the defendants, and although the plaintiffs' case is not on the pleadings placed on the ground of estoppel, yet it must have been known that the evidence on the question of ratification could be applied, as it has been applied, in support of that ground. Still I think it must have been fairly open to the defendants in the Divisional Court when they found the point of estoppel there urged against them for the first time, to have applied to that Court for permission to give further evidence on that point before leaving the case for judgment there. Speaking for myself, I should say that there was much to support such an application.

But the case was fully argued before the Divisional Court on this very ground, in reliance on the evidence at the trial, and whether or not any objection was made to the Court entertaining it because not open on the pleadings or taken at the trial, the fact remains that no application of which the court could take notice was then made for leave to give further evidence. The case was left for judgment, and the application was not renewed until after judgment had been given for the plaintiff on the point involved, and the case taken to appeal.

Looking at the nature of the evidence proposed to be given, involving a direct conflict of testimony between two gentlemen as to their recollection of a conversation, I think it would not be in accordance with the practice which has hitherto prevailed, and would establish a vicious precedent if we were to accede to the application: *Boswell v. Coaks*, 27 Ch. D. 424; *Evans v. Benyon*, 37 Ch. D. 329.

With regard to the point of practice referred to by my brother Patterson, the case does not seem to call for the expression of a final opinion. At present I do not understand it to be settled that a party is bound to go into his evidence at the risk of not being afterwards allowed to adduce it, if at the close of his adversary's case the Judge is prepared to decide in his favour.

HAGARTY, C. J. O., concurred.

Motion refused.

RE SOULES V. LITTLE ET AL.

Prohibition—Division Court—Co-defendant out of jurisdiction—Taking chances at trial—Delay in moving.

T., one of the defendants in a Division Court action, resided out of Ontario, and process was served substitutionally upon him. L., the other defendant, objected that the Court had no jurisdiction by reason of T.'s absence from the Province. No written notice of this objection was given before the trial, there was a conflict of evidence as to whether it was taken at the trial, and the suit was defended on a different ground. The trial was on the 13th January, 1888, when judgment went for the plaintiff for more than \$100; a new trial was moved for by L., and was refused on the 23rd February, 1888; execution then issued, under which goods of L. were seized, and became the subject of an interpleader. L. did not appeal, but on the 16th May, 1888, moved for prohibition.

Held, that L. having taken his chances at the trial, and not having appealed, nor sufficiently accounted for his delay in moving, the discretion of the Court should not be exercised in his favour.

[July 11, 1888.—*Falconbridge, J.*]

MOTION by the defendant Little for prohibition to the 4th Division Court of York.

The suit was commenced by special summons, dated 17th December, 1887, on a promissory note made by both defendants, payable 25th November, 1887, for \$118 and interest, to plaintiff or bearer.

An order was made by the Junior Judge of the county of York, dated 22nd December, 1887, allowing substitutional service of the summons on the defendant Thompson, who then and at the time of the present motion was in the state of New York.

At the trial, on the 13th January, 1888, Thompson did not appear. Little was represented by Mr. Widdifield, a solicitor, and Mr. Woodcock, a conveyancer and Division Court agent.

No written notice objecting to the jurisdiction was given before the trial. Judgment went for the plaintiff for \$120 and costs.

On the 23rd January application was made by Little to the Division Court Judge to set aside the judgment and for a new trial. On the 23rd February judgment was given refusing the new trial.

On the 16th May notice of this application was given. The motion was made solely on behalf of Little, Thomp-

son not having instructed or authorized it. The explanation given of the delay in moving was that the defendant Little had not furnished the funds to his solicitor earlier.

On the 8th June, 1888, *W. T. Allan* supported the motion.

C. J. Holman, contra.

Judgment was delivered on the 11th July, 1888.

FALCONBRIDGE, J.—The absence of a written notice objecting to the jurisdiction is probably immaterial under *Re Knight v. Medora*, 14 A. R. 112, as, if the objection is good, no Division Court would have jurisdiction.

It is alleged in the affidavits filed by the defendant that objection to the jurisdiction was taken at the trial on the ground that the defendant Thompson resided out of the province of Ontario.

Mr. Robertson, who appeared for the plaintiff, denies this, and the learned Judge's notes (the matter being within the increased jurisdiction of the Division Court) contain no note or entry of this objection.

The case was fought out on a totally different ground, and from the depositions of defendant, of Mr. Widdifield, and of Mr. Woodcock, it is clear that if this objection were mentioned at all, it was so faintly urged that it was practically abandoned.

After the refusal of the new trial, and before this application, execution issued, and the goods of Little were seized and formed the subject of an interpleader.

The defendant Little did not choose to appeal from the judgment of the learned Judge.

It is clearly a case where he took his chances at the trial, and the discretion of the Court should not now be exercised in his favour; *Guy v. The Grand Trunk R. W. Co.*, 10 P. R. 372.

The delay in moving is not sufficiently accounted for; *Denton v. Marshall*, 1 H. & C. 654.

The motion must be refused, with costs.

LIVERNOIS V. BAILEY.

Costs, scale of—Setting off costs—R. S. O. (1877) ch. 50, sec. 347, sub-sec. 3.

In an action for damages for breach of a contract, the jury awarded the plaintiff \$68.50, and the trial Judge entered judgment for that amount, and certified to entitle the plaintiff to costs on the Division Court scale, and to prevent the defendant from setting off High Court costs.

On appeal a Divisional Court varied the order as to costs so as to give the plaintiff such costs only as he would have recovered under R. S. O. (1877), ch. 50, sec. 347, sub-sec. 3, where the Judge at the trial did not certify.

[June 29, 1888.—*The Common Pleas Division.*]

THIS action, which was tried before MacMahon, J., at Hamilton, with a jury, was brought to recover damages for non-fulfilment of a contract for the sale of apples. The defence was, that the contract, if any ever existed, was rescinded, and that there was no contract reduced to writing, as required by the Statute of Frauds. The jury found that there was a contract, and assessed the damages at \$68.50. The learned Judge gave judgment in favour of the plaintiff for \$68.50 and reserved the question of costs. He subsequently certified to entitle the plaintiff to costs on the Division Court scale and also certified to prevent the defendant from setting off Superior Court costs. The judgment in favour of the plaintiff for the amount of the damages was given on the 24th January, 1888, and the certificate as to costs was not given until the 27th February. On the 8th February an order *nisi* was obtained by the defendant calling on the plaintiff to shew cause why the verdict and judgment should not be set aside on the ground that no contract was proved to have been made between the parties and on other grounds mentioned in the order; and on 3rd March notice of motion was given by defendant against the certificate of the learned Judge depriving the defendant of his right of set-off of costs.

On the 23rd May, 1888, both motions were argued together before a Divisional Court composed of Galt, C. J., and Rose, J.

Aylesworth and *H. H. Collier*, for the defendant.

J. W. Nesbitt, for the plaintiff.

GALT, C. J.—In my opinion the contract was proved and the offer of the defendant had been accepted by the plaintiff before the defendant wrote the letter rescinding the same. Then as to the damages, the evidence proves that the defendant had received from the sale of his apples at least the sum allowed by the jury over and above the price to be paid by the plaintiff. I therefore see no reason to interfere with the judgment on that point.

The question of costs remains to be considered. The learned Judge has certified to prevent the defendant from setting off costs. Mr. Nesbitt contends that there is no appeal from this decision. The right of the Court to consider the question of costs has been very fully discussed in the Court of Appeal in *Mitchell v. Vandusen*, 14 A. R. 517, and *Wills v. Carman*, in the same volume, page 656; see also *Wansley v. Smallwood*, 11 A. R. 439. The case of *Jones v. Curling*, 13 Q. B. D. 262, is in point as respects the right of appeal. The head-note is: "Where an action is tried with a jury, the Judge before whom it is tried has no authority under Order LXV., rule 1 (which is the same as our Rule 428), to make an order by which the costs will not follow the event unless there exist 'good cause,' within the meaning of that rule, and consequently there is an appeal with respect to the existence of the facts necessary to give the Judge jurisdiction to make such order." Bowen, L. J., in his judgment, p. 271, after referring to the rule says: "That rule begins with placing in the discretion of the Court the costs of all proceedings in the Court, but then follows a provision by which in the event of a jury trial the costs are removed from the discretion of the Judge and are to follow the event, except in one case, which is, if the Judge shall for good cause otherwise order. It appears to me that these latter words restore costs to the discretion of the Judge, provided a condition precedent is

fulfilled ; that is to say, provided there is good cause. But unless there are facts from which a reasonable man might think the exceptional order was one which was more just than allowing the costs to take the ordinary course, there can be no good cause, and if there is no good cause then the Judge had no jurisdiction. It seems to me that on the true construction of this rule there is an appeal with respect to the existence of the facts upon which alone the jurisdiction of the Judge depends."

Rule 428, after stating (as in the English rule above referred to) that the costs of and incident to all proceedings in the High Court shall be in the discretion of the Court contains the following proviso : " Provided, that where any action or issue is tried by a jury, the costs shall follow the event, unless, upon application made at the trial, for good cause shewn, the Judge before whom such action or issue is tried, or the Court, shall otherwise order." Under this rule the plaintiff, supposing the Judge had made no order, would have been entitled to tax full costs, but the Judge had power for good cause shewn to deprive him of costs or to regulate the scale by which they should be taxed. If then the Judge had made an order, allowing the plaintiff Division Court costs there could have been no question as to setting off costs by the defendant, and the only question on an appeal would have been whether good cause was shewn for making such an order ; there could have been no appeal by the defendant. As it was feared this rule might be productive of injustice, the Supreme Court on 28th January, 1882, passed an order No. 512, as follows : " In case of trial by jury, and the Judge or Court makes no order respecting the costs, under rule 428, the taxation of costs shall be under such scale of allowance only as would have been applicable before the passing of the Judicature Act ; and the event shall in such case be to recover costs according to such scale, subject to such rights of set-off as to costs as apply under the Common Law Procedure Act." It is plain this rule was intended to apply to such cases only in which the Judge had made no

order, but was not intended to interfere with the discretion conferred on him by rule 428. In my opinion both rules must be discharged upon all grounds save as to the question of costs, and the costs should be as under sub-sec. 3 of sec. 349, C. L. P. Act. There will be no costs of either motion.

ROSE, J.—I do not think any tenable objection can be urged to the learned Judge's charge or to the findings of the jury.

It seems to me there was evidence to sustain the finding of a contract and that the findings, read in the light of the evidence and the Judge's charge, are, that the plaintiff accepted the terms of the defendant's letter *simpliciter*.

I am also of the opinion that the evidence, which the jury evidently believed, that there were no apples to be had equal to those contracted for, and of the profit made by the defendant from the sale of the very apples sold to the plaintiff, prevents our interfering with the finding as to damages.

As to our right to review the judgment as to costs, it seems to me that under Rule 428, apart from 428*a*., the plaintiff would be entitled to full costs unless the Judge had otherwise, for good cause, ordered, and that the effect of the order made was to limit the amount of the recovery to such sum as would have been recovered in the Division Court. I am also of opinion that under Rule 428 there is no right of set-off, all former rules having been repealed, and therefore the reference to set off of costs in our learned brother's order was unnecessary.

Rule 428*a*. does not apply, as there has been an order.

The result would be, that as the Judge has exercised his discretion for good cause, *i.e.*, the cutting down or limiting the costs where the recovery is of a sum which might have been recovered in the Division Court, we cannot entertain an appeal merely to have the plaintiff's costs lessened by a larger sum; in other words, to lessen them by a sum which would equal the sum the defendant would have recovered under the old practice, allowing a set-off, unless we could

interfere on the ground that it is not in affirmance of a principle, viz., that when a plaintiff brings in the High Court a suit which should have been brought in an inferior Court the defendant should not bear any greater burden by way of costs than if the action had been brought in the proper forum.

I am not satisfied with the principle of the decision, which is the same as that adopted by myself in *Wilkinson v. Harvey*, before us during this sittings, and which is in my opinion open to the same objection, viz., that when an action is brought in the High Court, which might well have been tried in an inferior Court, the Judge should not give the plaintiff or inflict upon the defendant more costs than if the action had been brought in the lower Court, unless indeed there be facts which, in the opinion of the Judge, warranted the action being brought in the High Court.

I do not attempt to formulate any rule which should govern the discretion of the Judge; each case must stand on its own footing. To illustrate, however, by reference to *Wilkinson v. Harvey*, I there awarded to the plaintiff \$100 damages in an action of trespass to goods, and stated that in my opinion the plaintiff could not reasonably have expected to have recovered more than \$200, but gave the plaintiff costs according to the County Court scale, and prevented the defendant setting off costs.

Upon reflection I do not see any warrant for making the defendant pay extra costs for the mistake of the plaintiff in bringing the action in the High Court.

So here the plaintiff recovered all he ought reasonably to have expected to have recovered, and he might have recovered \$100 in the Division Court and \$200 in the County Court. Why then should he have more than such costs as he would have had if he had brought his action in the lower Court, or why should the defendant pay a penalty for his mistake?

The plaintiff deserves no consideration, for, as he said, he brought the action not for the sake of the damages but to teach the defendant a lesson.

I have expressed my opinion freely, as my learned brother is in full accord with my views, and we both agree that the judgment in this case, and the case of *Wilkinson v. Harvey*, should be amended to follow the principle I have endeavoured to lay down, which is in effect the same as the practice under sec. 347 of the C. L. P. Act, R. S. O. (1877) ch. 50.

The judgment will therefore be affirmed in all respects, save as to costs; and the order as to costs will be varied so as to give the plaintiff such costs as he would have recovered under sub-sec. 3 of sec. 347, where the Judge at the trial did not certify.

LEITCH V. GRAND TRUNK RAILWAY COMPANY.

Discovery—Examination of officer of corporation—R. S. O. (1877) ch. 50, sec. 156—Ex parte order—Railway conductor—Discovery before second trial from witness examined at first trial.

An order for the examination of a person as an officer of a corporation, under R. S. O. (1877) ch. 50, sec. 156, is properly made *ex parte*.

The conductor of a train on which the plaintiff was a passenger when the accident out of which the action arose occurred, *Held*, examinable as an officer of the railway company, under sec. 156.

A person who is called as a witness at the first trial of an action and cross-examined cannot again be examined, under such section, for discovery before a second trial.

[August 10, 1888.—*MacMahon*, J.]

THIS was an appeal by the defendants from an order to examine David Allison, a conductor on the defendants' line of railway, made on the application of the plaintiff by the local Judge at London, and a motion for an order to set aside the order of the local Judge, and the appointment for the examination of Allison thereunder, upon the following grounds:

1st. That the order was made without notice to the defendants upon the *ex parte* application of the plaintiff.

2nd. That Allison was not an officer of the defendant company liable to be examined for the purpose of discovery.

3rd. That under the circumstances disclosed in the affidavits, and at this stage of the cause, and after what took place at the trial of the action, the plaintiff was not entitled to examine Allison.

The facts appear in the judgment.

Hoyles, for the appeal.

Rae, contra.

MACMAHON, J.—The order was granted under sec. 156 of ch. 50, R. S. O., (1877). By sec. 158 of the same Act the order referred to in sec. 156 "shall be granted as of course" on the production of such an affidavit of the party applying as is therein required.

The order appealed against being obtainable *ex parte*, the power and authority of the County Court Judge to make it is provided for by Rule 423 of the Judicature Act, and notice to the defendants was not necessary.

As to the second ground, Allison was the conductor on the train on which the plaintiff was a passenger when the accident occurred causing the injury to the plaintiff, in respect of which the action is brought. As conductor he was in charge of and the superior officer on the train, and as such accountable to the company for its proper management. Looking at the cases of *Ramsay v. The Midland R. W. Co.*, 10 P. R. 48; *Goring v. London Mutual Ins. Co.*, *ib.* 642; and *Odell v. The City of Ottawa*, 12 P. R. 446, I think Allison may be properly regarded as an "officer" of the defendants, and as such examinable under the provisions of ch. 50, sec. 156, R. S. O., (1877).

As to the third ground, this cause was tried before me at the London Assizes in May last, when the jury disagreed, and were discharged; Allison, the person whom the plaintiff now seeks to examine, was called at the trial as a witness on behalf of the defendants, and was cross-examined by the plaintiff's counsel at length, and the witness had then in his possession and offered to produce the book which he is now called upon to produce by the notice indorsed on the order to examine, but the plaintiff's counsel declined to examine it, and refused to permit the witness to produce it.

The question now is whether the plaintiff, after a trial in which the person now sought to be examined was called as a witness, and was submitted to a cross-examination, can be examined again for the purpose of discovery?

Sec. 156 of ch. 50, R. S. O., (1877), is as follows: "Any party to an action at law, whether plaintiff or defendant, may at any time after such action is at issue, obtain an order for the oral examination, upon oath, before a Judge * * of any party adverse in point of interest, or in case of a body corporate of any of the officers of such body corporate, touching the matters in question in the action," &c.

The language of the section is, no doubt, very wide; but I do not think it can fairly be contended that after a trial has taken place, when the person sought to be examined was a witness thereat and cross-examined, and offered to make a full discovery of the contents of the book then in his possession, that he can now be brought up for the purpose of examination and discovery under sec. 156.

Section 156 says that the order for examination may be obtained "at any time after such action is at issue," which cannot mean, according to my view, after the trial of the issues between the parties has taken place, and after the party sought to be examined has given his evidence on the trial of such issues, even although the jury disagreed and were discharged.

The order of the local Judge and the appointment for the examination of Allison must be set aside. I see no reason for withholding the costs of the application from the defendants.

MACKENZIE ET AL. V. CARTER.

Affidavits—Date of filing—Statement in notice of motion.

Upon a motion to commit the defendant the Court refused to allow the plaintiffs to read affidavits filed upon a previous application, the date of their filing not having been stated in the notice of motion; and also refused to allow the plaintiffs to read an affidavit filed after the service of the notice.

[August 28, 1888.—*Falconbridge, J.*]

MOTION by the plaintiffs to commit the defendant for alleged disobedience to an order of a Divisional Court dated 14th June, 1888. The notice of motion was dated 5th August, 1888, and was served on the 8th August.

On the 21st August *Masten* supported the motion, and *Hoyles* shewed cause.

FALCONBRIDGE, J.—Two preliminary objections were taken by defendant's counsel, and the matter was also very fully argued on the merits.

In my opinion, one, at least, of these objections is entitled to prevail.

The notice reads, "And upon and in support of such motion will be read the pleadings and proceedings in this action and the affidavits of Levi Brooks, Charles Donaldson, and the plaintiff, and of Norman McDonald, filed upon this application."

All these affidavits, except that of Norman McDonald, were used on an application to the Divisional Court in June, and were filed on or before 25th July, in the office of the Clerk of Records and Writs, and were never refiled. That of Norman McDonald was filed with the Clerk in Chambers on 9th August.

The objection to which I feel bound to give effect, is that as to the affidavits filed on the former motion, the date of the filing of such affidavits should have been stated in the notice of motion, and that not having been done, the affidavits could not be read.

The rule is so stated in *Mr. Holmsted's* notes on Chancery Order 261, (vol. 1, p. 145) and it is, on the authorities which he cites, correctly stated (*Fraser v. Fraser*, 13 Gr. 183; *McMartin v. Dartnell*, 2 Ch. Chamb. R. 322). I refer also to *Daniell's* Ch. Pr. 5th ed., 1444, citing *Clement v. Griffith*, 1 C. P. Cooper 470.

This rule of practice appears never to have been superseded or modified. It has been rigidly enforced in ordinary motions, as for injunctions, &c.; and it is a trite saying that a motion of this kind is *strictissimi juris*.

The affidavit of D. McDonald, if it were alone sufficient to sustain the motion, which in my opinion it is not, could not under order 261 be read, as it was filed after service of the notice of motion.

[It is considered unnecessary to report the remainder of the judgment.]

Motion refused: costs to defendant in any event.

ROGERS V. WILSON.

Mortgagor and mortgagee—Assignment of mortgage to third person—49 Vic. ch. 20, sec. 7, (O.)

[September 14, 1888.—*The Court of Appeal.*]

The judgment of Rose, J., ante p. 322, was affirmed on appeal to the Court of Appeal.

C. C. Robinson, for the appellant.

A. M. Taylor, for the respondent.

REGINA EX REL. TAVERNER V. WILLSON.

Municipal corporations—Controverted election—Addition of new territory to city—Disqualification of voters—R. S. O. (1887) ch. 184, secs. 84, 89.

Where a city made additions to its territory, and thereby included within its corporate limits a portion of an outlying township ;

Held, that, regard being had to the provisions of the Municipal Act, R. S. O., (1887), ch. 184, secs. 84, 89, persons who, but for such action on the part of the city, would have been entitled to vote in the township, were thereby debarred from voting at the township municipal election next ensuing, notwithstanding that the nomination of candidates for such election took place before such addition.

[June 19, 1888.—*Rose, J.*]

MOTION by the relator on the return of a summons in the nature of a writ of *quo warranto*, under the Municipal Act, for an order vacating the election of the respondent as reeve of the township of York, and for a new election.

The objection to the respondent's election was that certain persons residing in or voting on property in Seaton Village, had cast their votes at the election in question, held on the 2nd January, 1888, notwithstanding that on the 1st January, 1888, a change had gone into effect whereby Seaton Village became part of the City of Toronto, and ceased to form part of the township of York. The nomination was held on the 26th December, 1887.

Aylesworth, for the respondent, shewed cause. At the time of the election Seaton Village was not part of the City of Toronto ; the day of nomination is the day of election ; *Reg. ex rel. Adamson v. Boyd*, 4 P. R. at pp. 213-4 ; *Reg. ex rel. Rollo v. Beard*, 1 U. C. L. J. N. S. 126 ; and see *Reg. ex rel. Clancy v. McIntosh*, 46 U. C. R. at pp. 105-6. The voters' lists for the township of York contained the names of the persons who voted in Seaton Village ; the finality of the voters' lists is well established ; see secs. 79, 82, 102 of the Municipal Act, R. S. O. (1887) ch. 184.

A. H. Marsh, for the relator. The cases cited are no authority for the proposition that a person may vote on

polling day by reason of his having been qualified as a voter on nomination day, notwithstanding that in the meantime he has been disfranchised.

Sec. 89 of the Act declares distinctly that the *election* may in a case of this sort take place on the first Monday in January, and that the *nomination* of candidates may take place on the last Monday of the preceding month of December. The same section speaks of the election of unopposed candidates taking place on the last Monday in December (that is on nomination day) but that is not at all inconsistent with my position, which is that the qualification of candidates must exist when they offer themselves for election on nomination day, and the qualification of voters must exist when they exercise their franchise on polling day. The respondent's proposition must necessarily be that the qualification of the voter need not necessarily exist on the day on which he votes, if his qualification existed a week previously on nomination day. Sec. 88 shows that the election takes place on polling day, save as to the unopposed candidates, and that these are elected on nomination day.

Sec. 3 of 41 Vic. ch. 21 (O.), contains a provision similar to that of sec. 82 of the Municipal Act, and the same section excepts from its operation those persons who subsequently to the certification of the voters' list became non-resident, "and who *by reason thereof* are under the provisions of the Election Act incompetent and *disentitled* to vote." Sec. 75 of the Election Act, (R. S. O., 1877, ch. 10) contains a provision (similar to that contained in secs. 84 and 129 of the Municipal Act) to the effect that the right to vote in the new territory shall be given to "all persons who *would have been qualified* as electors if such territory remained separate," &c. This section by necessary implication "disentitles" such persons from being electors in the rural municipality, *by reason of their becoming non-resident*, and it is the only clause of the Election Act which satisfies the reference to that Act contained in sec. 3 of 41 Vic. ch. 21; and the latter section contains in effect a statutory

declaration that sec. 75 of the Election Act so operates, notwithstanding the provision of sec. 73 of the Election Act, which is equivalent to sec. 82 of the Municipal Act. We therefore have a statutory declaration of the effect of those provisions of the Election Act which are equivalent to sec. 82, 84, and 129 of the Municipal Act.

Sec. 79 of the Municipal Act is expressly made subject both to sec. 82 and to sec. 84 of that Act.

ROSE, J.—It would seem clear on the authorities and from the wording of the Act, that generally speaking an election cannot be said to take place on the polling day, but rather it must be said that the proceedings are begun on nomination day, and that the polling is but a step taken in the election.

Otherwise it would be difficult to define when the election took place; for those candidates who were unopposed would be elected on nomination day (sec. 116, ch. 184, R. S. O., 1887), and those who were opposed would not be elected until after the polling had taken place (sec. 160) and there would be two election days.

Therefore the change effected by the addition of the territory in question to the city did not strictly come into effect before the election took place.

I would have yielded to Mr. Aylesworth's argument, holding that sec. 84 of the Municipal Act of 1883, same section, ch. 184, R. S. O., (1887,) did not apply, were it not for the provisions of sec. 89.

Sec. 84 provides that "Where any territory is added for municipal purposes to any city * * and an election takes place before voters' lists, including the names of persons entitled to vote in such territory are made out for such * * enlarged city * * then all persons who would have been qualified as electors in such territory if the same had remained separate from the city * * *shall be entitled to vote in the city* * * at such election;" for that section clearly contemplates an election taking place

after the territory is added to the city, and provides for voters in the added territory voting in the city.

But sec. 89 (1883) and ch. 184, R. S. O., (1887) evidently provides for such a case as this. It reads, "In case of * * an additional tract of land being added to an incorporated village, town or city * * — the first election, under the proclamation or by-law by which the change was effected, shall take place on the first Monday in January next after the end of three months from the date of the proclamation, or from the passing of the by-law by which the change is made, and until such day the change shall not go into effect; but the nomination of candidates and the election of such officers as are unopposed, may and shall be proceeded with at the same time and in the same manner as if such change had gone into effect on the last Monday of the month of December preceding such first election, or on such other day as the nominations may lawfully be held upon."

It seems clear that by "election" in this section is meant the polling day, and where as here the change goes into effect on the polling day, or the day before, the election, that is the polling, shall proceed on such day, being the first Monday in January, and the nomination and the election of those who are unopposed shall be proceeded with prior to the change going into effect, and as if it had gone into effect on the nomination day.

The effect, therefore, of sec. 89 is that in this case the change was effected prior to the election; and of sec. 84, that the voters in the territory added to the city were entitled to vote in the city.

I suppose there will be a scrutiny of the votes cast in Seaton Village.

[By consent of parties further proceedings were abandoned, and the *quo warranto* summons discharged without costs.]

O'SULLIVAN V. LAKE ET AL.

Parties—Appeal—Relief over.

The plaintiff served notice of appeal from the judgment of the Common Pleas Division, 15 O. R. 544, upon both defendants, and furnished both with security for costs of appeal, but disclaimed any relief against the defendant B., and brought him before the Court only that the defendant L. might obtain any relief over against B. that he might consider himself entitled to. No notice of setting down or reasons of appeal were served on B. L. claimed no relief against B. in his pleadings or reasons of appeal.

Held, that B. was not a person who would or might be affected by a reversal of the decision complained of, and there was no reason for retaining him before the Court.

[September 13, 1888.—*Osler*, J. A.]

THIS was an action for alleged negligence in the valuation of land offered as mortgage security for an advance by the plaintiff. At the trial a nonsuit was entered as against the defendant Balfour on the ground of want of privity, and the plaintiff recovered a verdict of \$3000 against the defendant Lake. Motions were made to the Common Pleas Divisional Court on behalf of the defendant Lake to reverse the verdict as against him, or for a new trial, and on behalf of the plaintiff for similar relief as against Balfour. The motion of Lake succeeded, and a new trial as against him was directed. The plaintiff's motion was dismissed with costs. (See 15 O. R. 544.) The plaintiff then in proper time served notice of appeal from the judgment of the Divisional Court on both defendants, and gave each security for costs on appeal. On 25th May, 1888, he wrote to the solicitors for Balfour that he sought no relief against that defendant, but was advised to retain him before the Court; also stating that no further notices, &c., in the appeal would be served on his solicitors. In reply the latter wrote on 28th May that they could see no reason for this course, and if the appeal as against Balfour were not duly prosecuted they would have to move to dismiss it. The appeal case being duly settled between the appellant and the respondent Lake, the appeal was set down on 25th June for the September sittings. No notice

of setting down, reasons for appeal, or appeal book were served on Balfour's solicitors. The 9th reason for appeal was as follows :

"9th. As regards the defendant Balfour, the appellant does not ask to have the judgment reversed, so far as the respondent Balfour is concerned. The appellant has endeavoured to obtain an agreement from respondent Lake's solicitors, permitting Balfour to be discharged from this action, but the respondent Lake's solicitors refused to assent to this, and Balfour is therefore retained in order that the respondent Lake may obtain any relief he may consider himself entitled to as against Balfour."

And the ninth reason against appeal of the respondent Lake was as follows :

"9. Respondent Lake has never refused to assent to the discharge of defendant Balfour, but has taken the ground that appellant must take such course as he might be advised, and that respondent Lake was not in a position and could not undertake to advise the appellant as to his duty in that respect."

There was nothing in the pleadings of defendant Lake claiming any relief over against Balfour, nor was such relief sought at any previous stage of the action. On 15th September, 1888, upon notice served on the plaintiff and on the solicitors for the defendant Lake, a motion was made in Chambers on behalf of the respondent Balfour to dismiss the appeal as against him for want of prosecution. The motion was argued on the 13th September, 1888.

Aylesworth, for the motion.

F. A. Anglin, for the appellant, contra, cited the following authorities : *In re New Callao*, 22 Ch. Div. 484, 494 ; *Purnell v. Great Western R. W. Co.*, 1 Q. B. D. 636, 642 ; *Hunter v. Hunter*, 24 W. R. 504 ; *Freed v. Orr*, 6 A. R. 690 ; *Sampson v. McArthur*, 8 Gr. 72, 84 ; Order xxiii. Court of Appeal.

No one appeared for the respondent Lake.

Judgment was delivered the same day.

OSLER, J. A.—There is not the slightest reason for retaining the respondent Balfour as a party in this appeal. The appellant disclaims any relief against him, and the judgment of nonsuit in his favour at the trial, therefore, cannot be disturbed. The respondent Lake claims no cross-relief against him, either in his pleadings or the reasons against the appeal, and on the contrary, in his ninth reason is careful to refrain from saying that he intends to do so. On the whole case, there is nothing to indicate that Balfour can be affected by a reversal of the judgment against Lake, and that being so, why should he be retained in the appeal? He has no interest in it and would not be allowed his costs of appearing at the hearing. I have looked at all the cases cited by Mr. Anglin, and they are all plainly distinguishable on the ground that the respondent or a person who ought to be respondent, and to be made a party to the appeal, would or might be affected by a reversal of the decision complained of. The appeal, as far as Balfour is concerned, must be dismissed with costs.

RE M'KEEN AND TOWNSHIP OF SOUTH GOWER.

Costs—Increased counsel fees—Arbitration—Powers of taxing officer.

Item 153 of Tariff A, Con. Rules of Practice, should be read as part of item 164 ; and the taxing officers at Toronto have authority to consider the question of increased counsel fees in the case of an arbitration where there is no cause in Court and a reference to a local officer to tax costs has been made under R. S. O. (1887), ch. 53, sec. 24.

[September 17, 1888.—*Boyd, C.*]

AN arbitration matter.

An order had been made under R. S. O. (1887), ch. 53, sec. 24, referring the taxation of the costs of an arbitration to the local Master at Brockville.

The taxing officers at Toronto declined to give an appointment to consider increased counsel fees, on the ground that that jurisdiction was not conferred upon them by item 164 of the tariff.

Middleton, for the plaintiff, now applied, *ex parte*, for a direction to one of them to issue such appointment.

BOYD, C.—The meaning of the provision in the new tariff, No. 164 (which is itself an item not appearing in the earlier tariffs), is that counsel fees incurred during arbitrations may be taxed and allowed as in cases of fees at the trial of actions. That, in effect, introduces item No. 153 as incorporated with No. 164, and enables the taxing officer at Toronto to allow increased fees in a proper case.

OLDFIELD V. BARBOUR ET AL.

Mechanics' Liens—One lien against two owners—Joinder of parties—Summary application in action.

Four mechanics worked with a contractor for wages upon two buildings, owned by different persons, and each registered a lien for his services on both the buildings, against the contractor and against both the properties on which they worked and against both the owners, each lien being for the amount of the whole wages claimed in respect of services as to both properties. All four joined in one action against the contractor and the two owners to enforce their liens.

Upon a summary application by the contractor, the mechanics' liens and writ of summons were set aside.

[September 14, 1888.—*The Master in Chambers.*]

THIS was a motion by the defendant Barbour, the contractor, to set aside the writ of summons, &c., in this action, brought to enforce mechanics' liens, or for an order striking out such of the plaintiffs as it might seem proper to the Court to strike out, or for an order vacating the *lis pendens*, or for such other order as might seem proper, on the ground that the plaintiffs were improperly joined in the action, and that the joinder of the plaintiffs, and the causes of action, were embarrassing to the defendants, and on the grounds in the affidavits and papers filed.

The motion was argued 12th September, 1888.

W. Davidson, for the motion.

Allan McNab, contra.

THE MASTER IN CHAMBERS.—The real matter is this—these plaintiffs have all joined in suing the defendants, being the contractor Barbour and the several owners of two distinct properties on which the contractor has erected buildings, one for each owner respectively.

The plaintiffs are four carpenters who worked with the contractor on wages, and were respectively hired by him to work for him, and were engaged in work on the said buildings. They have registered a lien, each of them for his wages for his services on both the buildings, against the contractor, and against both the properties on which

they worked, and against both the owners; that is each of them, for the whole wages due in respect of services as to both properties.

This motion is made on behalf of the contractor.

He objects that this is utterly bad, not merely irregular, this filing a claim against one man's property for another man's liability, and I think that it is so.

In the first place it is answered that even if the owners might object, yet the contractor cannot. But that must be wrong in law. The contractor disputes the claim of the plaintiffs altogether; (I know nothing of the merits of his contentions) and by means of the joint certificates against the owners and the properties he is prevented from settling with either of the owners until he has settled with *all* the plaintiffs. This surely is a consequence which should not be allowed to exist against the contractor. He therefore has a right to object to such a mechanics' lien, just as much as the owners; and how can it possibly be maintained that it is right to charge against one man's property a claim for services performed on the property of another man. It is against natural justice. There is judicial authority for this view. See *Currier v. Friedrich*, 22 Gr. 243.

But then it is further said that this is a matter of defence to the action to arise upon pleadings, and to be tried in regular course. I do not think so.

These four men have each a claim against Barbour—not any joint claim of the four—and each can and should sue him for it in the Division Court. If they cannot maintain their mechanics' lien that has been filed, they cannot maintain any joint action; and why should the defendant, the contractor, be compelled to go through a long expensive suit in the High Court to shew his defence, when it is already quite manifest that the plaintiffs cannot maintain their case under the statute?

I therefore come to the conclusion that I ought to set aside this writ of summons altogether, with the mechanics' lien and *lis pendens* thereon, because the suit, it is plain,

cannot be maintained by these plaintiffs against the defendants, or any one of the defendants, and it seems to me a cruel thing that the contractor should be compelled to go into a heavy litigation which it is plain must end in his favour, from facts that are quite apparent now.

The defendant Barbour swears to his belief that the plaintiffs are unable to pay costs, should the suit be determined against them.

I do not see that there need have been any difficulty in fixing approximately, and very nearly in this case, the amount due to each plaintiff for services on each building.

But there may easily be a case not within the statute at all. For a contractor may have say two hundred men, and twenty contracts on hand, with the work in the shop and on the respective premises of the owners so intermixed that it would be impossible for the workman to affix his claim on any property or owner in particular.

Order accordingly.

GREEY V. SIDDALL.

Venue—Convenience—Cause of action—Leave to appeal—Terms.

The question for decision on an application to change the place of trial is, where can the action most conveniently be tried?

And where, in an action on a promissory note for the contract price of work done by the plaintiff in refitting a mill in the county of Middlesex, to which the defence was that the contract had never been carried out, the plaintiff had eight witnesses in Toronto or east of Toronto, and the defendant eight in Middlesex or west of Middlesex, upon the defendant's application to change the place of trial from Toronto to London, it was

Held, that London was the most convenient place for trial, and the venue was changed accordingly.

Per ARMOUR, C. J.—An action should be tried in the county where the cause of action arose.

Leave to appeal to the Court of Appeal was asked by the plaintiff because it was of importance to him in other litigation to have the question of venue decided, and was granted upon his undertaking to pay the costs of both parties of the appeal.

[June 1, 1888.—*The Queen's Bench Division*].

AN appeal by the plaintiff from an order of Galt, C. J., in Chambers affirming an order of the Master in Chambers changing the place of trial from Toronto, the place proposed by the plaintiff in his statement of claim, to London.

The plaintiff entered into a contract with the defendant to refit with the roller system the mill of the defendant at Denfield, a village in the county of Middlesex, about sixteen miles west of London. The contract was made in Toronto; the refitting was done at Denfield, by workmen of the plaintiff sent there for the purpose; and a promissory note was given to the plaintiff for part of the contract price of the work, which note was dated at London, payable at Toronto. Upon this note the action was brought; the defence was want of consideration because, as alleged, the contract of the plaintiff was not carried out.

The defendant on his application to change the place of trial swore that eight witnesses would be necessary and material to prove his case at the trial, all of whom were in the county of Middlesex or west of it; and the plaintiff in answering the application also swore to eight necessary and material witnesses all in Toronto or east of Toronto.

GALT, C. J., in affirming the Master's order, imposed upon the defendant the terms that he should admit the making of the promissory note and the plaintiff's title to it, in order to prevent the necessity of calling witnesses as to these matters.

The appeal was argued before a Divisional Court composed of Armour, C. J., and Falconbridge, J., on the 1st June, 1888.

H. D. Gamble, for the appeal. The plaintiff has the right to lay the venue where he thinks fit, and his choice of a place will not lightly be interfered with. [ARMOUR, C. J.—I never was impressed by that view. Originally the venue had to be laid where the cause of action arose, and if it was not laid in the proper place the defendant took out a side-bar rule to change it to the proper place; then it could be changed again if it were shewn that the first place or another place was the most convenient. In Chancery the plaintiff laid the venue, but if he did not lay it in the most convenient place, it was changed. Under the Judicature Act system it became necessary that the plaintiff, who was the party to take the first proceeding, should name the place of trial: it might be that no other pleading would be delivered after the statement of claim, and so it was necessary to have the plaintiff name the place of trial, as somebody must name it; but this affords no argument that the plaintiff has an absolute right to say where the action is to be tried. The question on such an application as this is, what is the most convenient place? In this Division we look to the place where the action can be most conveniently tried. The Judicature Act was never intended to give the plaintiff a paramount right to have the cause tried where he pleased. Suppose, in this case the trial Judge thought it necessary to have a view of the mill?] The mill is sixteen miles from London. There is no prospect that a view will be of any advantage. There is no preponderance of convenience in favour of London. [ARMOUR, C. J.—Two tribunals have thought so.]

[*Shepley*, for the defendant. The Master thought it more fitting that the action should be tried where all the work was done than a hundred miles away.]

[ARMOUR, C. J.—It was for the plaintiff's profit that he took a job in Middlesex, and he ought not to complain if he has to go there to get his money.]

Gamble.—The defendant has at all events no more right than the plaintiff to say where the trial is to be. If it comes down to a question of convenience, it seems that Toronto is more convenient for the plaintiff, and London for the defendant; the defendant must make out some case for a change. [ARMOUR, C. J.—There are long delays in Toronto; the witnesses from Middlesex may be here ten days. Then these statements about the witnesses are generally not reliable. The party that swears last swears to the most witnesses.] It must be assumed that the evidence is true, as it is not contradicted; and from the evidence it appears that the venue should remain in Toronto. I should like to refer the Court to the cases on change of venue. [ARMOUR, C. J.—We are familiar with the cases.]

Shepley, contra. The order of Galt, C. J., provides that the note sued on is to be admitted, and also the plaintiff's title; that will diminish the number of witnesses for the plaintiff. The affidavit of the plaintiff does not say that he has no witnesses in Middlesex; it may be that he, as well as the defendant, has witnesses there. Then, the plaintiff speaks of witnesses in Toronto, no doubt the workmen who refitted the mill; these men reside in Toronto, but they may not be there at the time of the trial; they are working on the plaintiff's contracts all over the Province, and may be actually in London when the trial comes off. Then as to expert witnesses, the plaintiff need not bring these from Toronto, but may get them in London just as well, and should do so: *Nicholson v. Linton*, 12 P. R. 223. Everything points to London as the proper place for trial; it is not merely the number of witnesses, but the fitness and propriety of having the trial there. I refer to *Phippen v. McLeod*, 7 P. R. 377.

[ARMOUR, C. J.—That decision has never been followed.] Then there may be a view required, or evidence as to the work in the mill may be required during the course of the trial, and can easily be obtained if the trial is at London. There is a very evident balance of expense in favour of London, and besides, there is the convenience and propriety of having the trial there.

Gamble, in reply. As to expert witnesses the plaintiff must choose these, wherever they are, whom he knows and can rely upon; the plaintiff is not to be dictated to as to where he is to get his witnesses from. On the general question I refer to *Ross v. Canadian Pacific R. W. Co.*, 12 P. R. 220, and especially to the language of Lord Esher, M.R., and Lindley, L.J., there quoted from *Shroder v. Myers*, 34 W. R. 261.

ARMOUR, C. J.—The English authorities are not at all applicable—the circumstances in England are entirely different. I do not think we can interfere in this case; the Master in Chambers has made the order changing the place of trial, and it has been upheld by Galt, C. J. We could not reverse these orders except on strong grounds; and we are, besides, of opinion that London is the most convenient place for trial. Speaking for myself, I repeat what I have always said, that the case should be tried in the county where the cause of action arose. In this case the substantial cause of action is the work done in Middlesex; the promissory note is practically of no importance. I believe I stand alone in this view; but we both think the appeal should be dismissed. The costs will be to the defendant in any event.

FALCONBRIDGE, J., concurred in the result.

Appeal dismissed.

Gamble asked for leave to appeal to the Court of Appeal, in order to have a decision which should settle the question

of venue in future litigation, the decisions at present being conflicting. He added that it was of importance to his clients in respect of other litigation to have an authoritative decision.

ARMOUR, C. J.—You may have leave if you undertake to pay the costs of both sides. If you want the law settled for your benefit in other cases, you must submit to these terms.

BRODERICK V. BROATCH.

Notice of trial—Service of before defence filed—Irregularity.

Where an overdue statement of defence was filed on the last day for giving notice of trial for the Assizes, and a joinder of issue and jury notice were filed by the plaintiff on the same day, but after the filing of the defence,

Held, that the service of notice of trial with the joinder and jury notice, on the same day, before the filing of the defence, was not an irregularity.

[September 22, 1888—*The Master in Chambers*].

[September 25, 1888—*Armour, C. J.*]

MOTION by the defendant to set aside a joinder of issue, jury notice, and notice of trial, as irregular, under the circumstances set out in the judgment.

The motion was argued on the 21st September, 1888.

W. H. Blake, for the motion.

Mahoney, contra.

THE MASTER IN CHAMBERS.—The rule is very old that the law will not regard the fraction of a day. But the exception is just as old that the Court will inquire into the priority of acts which occurred on the same day, where necessary for the determination of rights or other purposes of justice.

The case of *Regina v. Edward*, 9 Ex. 628, a decision in the Exchequer Chamber, would except from the excep-

tion judicial acts; but there are not wanting old cases which would warrant the inquiry even in the case of judicial acts. The general law will be found in the following cases: *Chit. Arch. Prac.*, 12th ed., 164, and the cases there cited; *Clark v. Bradlaugh*, 8 Q. B. D. 62; *Campbell v. Strangeways*, 3 C. P. D. 105; *Combe v. Pitt*, 3 Bur. at p. 1434; *Johnson v. Smith*, 2 Bur. 950; *Wright v. Mills*, 4 H. & N. 488; *Evans v. Jones*, 3 H. & C. 423.

The point here does not concern a judicial act. This is a motion to set aside a jury notice, issue, and notice of trial.

The proceedings are carried on in Belleville. The defence was due on the 13th, but not filed till the 14th, which was the last day for notice of trial—and withheld till that time for the purpose of putting an obstacle in the way of going to trial. The plaintiff served the issue, notice of jury, and notice of trial on the 14th at twenty minutes before ten a.m. This was in Cobourg. At ten a.m. the defence was filed in Belleville, and immediately thereafter the issue and jury notice. So that the services were all made twenty minutes before the filing of the issue and notice of jury. That is the alleged irregularity.

It is to be remembered that the general rule remains that the Court will not regard the fraction of a day, unless the circumstances be such as to require such a discrimination.

Do the circumstances here require it? I think not. The purpose is to go to trial. It is necessary for that, that issue should have been joined on the 14th at the latest; the same as to notice of trial; that must have been given on the 14th; then in business hours during the 14th, the defendant was under notice of trial, the cause also being at issue.

That is enough; no injustice is done to the defendant, and it is therefore not necessary to inquire, since the acts were all done on the same day, whether the service preceded the filing.

I must dismiss this with costs to plaintiff in the cause.

The defendant appealed from this decision to a Judge in Chambers, and the appeal was argued on the 25th September, 1888.

C. J. Holman, for the appeal.

Mahoney, contra.

ARMOUR, C. J., at the close of the argument dismissed the appeal, with costs.

RE ONTARIO TANNERS' SUPPLIES COMPANY AND ONTARIO
AND QUEBEC RAILWAY COMPANY.

*Railway company—Expropriation of land—Notice—Time—51 Vic. ch. 29,
sec. 164 (D.).*

In the computation of the ten days' previous notice necessary to be given under 51 Vic. ch. 29, sec. 164 (D.) to obtain a warrant for the possession of land by a railway company, the day of the service of the notice and the day of the return must both be excluded.

[September 20, 1888.—*Armour*, C. J.]

ON the 18th of September, 1888, *MacMurchy*, for the railway company, applied to Armour, C. J., for a warrant for immediate possession of certain land, under the provisions of 51 Vic. ch. 29, sec. 163 (D.), upon notice served upon the owner of the land on the 8th of September, 1888.

S. M. Jarvis shewed cause, and objected that sufficient notice had not been given; that notice served on the 8th for the 18th was too short.

ARMOUR, C. J.—Section 164 of 51 Vic. ch. 29 (D.) provides that "the Judge shall not grant any warrant under the next preceding section, unless ten days' previous notice of the time and place when and where the application for

such warrant is to be made, has been served upon the owner of the land," &c.

I am of opinion that, in the computation of the ten days, the day of the service of the notice and the day upon which the application is to be made must both be excluded, and that consequently the notice given was insufficient.

If the expression used had been "at the least ten days," the notice would have been clearly insufficient; and it appears to me, as it did to Littledale, J., in *Regina v. The Justices of Shropshire*, 8 Ad. & El. 173, "that a day is a day, whether 'at least' be added or left out."

I refer to *Zouch v. Empsey*, 4 B. & Ald. 522; *The Queen v. Aberdare Canal Co.*, 14 Q. B. 854; *Scott v. Dickson*, 1 P. R. 366; *Montgomery v. Brown*, 2 U. C. L. J. N. S. 72; *Hyde v. White*, 24 Texas 138.

I must refuse the warrant; but as there is, in the circumstances of this case, no merit in the objection, I refuse it, so far as I have the power to do so, without costs.

BLAKELEY V. BLAASE.

Discovery—Examination of transferee of judgment debtor—49 Vic. ch. 16, sec. 12 (O.)—Ex parte order—Date of transfer—Service of order—Chattel mortgage a transfer—Appeal—Time.

1. An order under 49 Vic. ch. 16, sec. 12 (O.), for the examination of the transferee of a judgment debtor, should not be made without notice to the transferee; nor should an order under that section be made without proof that the transfer was made since the date when the liability of the judgment debtor was incurred.
2. If the original order is not shewn at the time of service of a copy, the person served cannot be brought into contempt for disobedience to it : *Meyers v. Kendrick*, 9 P. R. at p. 366, followed.
3. A chattel mortgage is a transfer of property and effects within the meaning of 49 Vic. ch. 16, sec. 12.
4. A transferee was allowed to appeal from an order for his examination after the time for appealing had expired, his delay being satisfactorily explained.

[August 17, 1888.—*MacMahon*, J.]

THIS was a motion by the plaintiff to commit James M. Lotteridge for contempt in not attending to be examined before a special examiner, pursuant to an order made by the local Master at Hamilton, on the 18th July, 1888, and an appointment thereon for his examination on the 24th of July.

Lotteridge gave notice that he would, on the return of the plaintiff's motion, ask for leave to appeal from the order of the local Master, and for an order to set aside and rescind it on several grounds.

James Parkes, for the plaintiff.

Master, for Lotteridge.

MACMAHON, J.—The order of the local Master was made under 49 Vic. ch. 16, sec. 12, (O.) which is as follows : "Where judgment has been obtained as aforesaid, the Court or a Judge may, on the application of the party entitled to enforce the judgment, order * * any person to whom the debtor has made a transfer of his property or effects since the date when the liability or debt which was the subject of the action in which judgment was obtained was

incurred, to attend * * and to submit to be examined upon oath as to the estate and effects of the debtor * * . The examination is to be for the purpose of discovery only, and no order is to be made on the evidence given on such examination."

The order was obtained *ex parte* and without notice to Lotteridge, on an affidavit of the plaintiff that he recovered judgment against the defendant Blaase on the 20th of June, 1888, for \$487.95, and costs, and that the judgment remains wholly unsatisfied; that in September, 1886, the defendant executed a chattel mortgage in favour of P. Grant & Son, for \$998.93, covering all his goods and chattels, which mortgage has been renewed; and that the plaintiff is desirous of examining Lotteridge, a member of the firm of Grant & Son, touching the said mortgage and the property of the defendant.

This is not an order properly obtainable on an *ex parte* application.

The order for examination under the Common Law Procedure Act, R. S. O. (1877) ch. 50, sec. 156, of parties and others adverse in point of interest, or in case of a body corporate of an officer of such corporation, for the purpose of discovery, is under section 158 of that Act, "granted as of course" upon the production by the party proposing to examine of the affidavit required by the latter section. And under section 307 of the same Act, of which Rule 370 of the Judicature Act is a transcript, the judgment creditor may obtain an *ex parte* order for the attachment of debts.

The section under which the order under consideration was made is added as a sub-section to sec. 17 of ch. 49, R. S. O. (1877) (A. J. Act), the language of which is almost identical with sec. 304 of ch. 50 R. S. O. (1877); and under the latter section it was held in *Irvine v. Mercer*, in December, 1856, which was upheld in *Smith v. McGill*, 3 U. C. L. J. 134, that an order should not be granted in the first instance. And in a later case of *Carter v. Cary* December, 1856, Richards, J., refused an order in the first

instance, being of opinion that the parties should have an opportunity of shewing why they should not be examined. And in the notes to sec. 287 of *Harrison's Common Law Procedure Act*, 2nd ed., pp. 389, 390 (which is the same as sec. 304, ch. 50, R. S. O., 1877), it is stated that "this now is the settled practice." And this was the practice followed on the application for a similar order in the recent case of *Gowans v. Barnet*, 12 P. R. 330.

Another ground of objection to the order is that the affidavit on which it was based does not shew that Blaase, the judgment debtor, had given the chattel mortgage to Grant & Son *since the date* when the liability which was the subject of the action in which judgment was obtained, was incurred.

As the Act provides that it is only a person to whom a debtor has made a transfer of his property and effects since the date the debtor's liability represented by the judgment was incurred, who can be examined, then that fact must appear by the affidavit; and indeed that fact forms one of the chief statements on which an order can be asked for, and without which averment in the affidavit, the order should not have been made.

The objection was also taken that the original order was not shewn to Lotteridge at the time of the service on him of the copy; and the affidavit of service does not state that the original order was shewn.

This of itself would be fatal to the present motion, as the original order must always be shewn at the time of service of a copy before a party can be brought into contempt and punished for disobedience: *Meyers v. Kendrick*, 9 P. R. at p. 366, per Osler, J.

Having reached the conclusion that the application of the plaintiff is not sustainable on the grounds to which I have referred, it is not absolutely essential that I should decide the other point raised by Lotteridge's counsel, namely, that the chattel mortgage given by the judgment debtor, Blaase, to Grant & Son was not a "transfer" of his property and effects, and that therefore Lotteridge was

not a person examinable under the section referred to. But as the point was discussed at some length, I think it better I should give the conclusion I have arrived at, after the best consideration I have been able to give to the question.

Coote on the Law of Mortgage, 4th ed., p. 1, says: "It has been found difficult correctly to define a mortgage, but for the ordinary purposes of conveyancers it has been considered as a pledge of real or personal estate evidenced by deed for securing the payment of money."

As a general thing a "transfer" has been regarded as what takes place on an absolute conveyance of real property; or a present sale of personal property, where the price is paid, and the property and possession pass at once from the vendor to the vendee; or under an absolute bill of sale, where the word "transfer" is used in every form of a bill of sale which I have seen.

I have not been able to discover any case where a mortgage is called a "transfer." A mortgage is generally designated as a mortgage security, although to call it a transfer by way of mortgage would not be technically inappropriate.

By ch. 124, R. S. O. (1887), "An Act respecting Assignments and Preferences by Insolvent Persons," it is provided (sec. 2) that: "Every gift, conveyance, assignment, or transfer, delivery over or payment of goods, chattels, or effects * * made by a person at a time * * when he is unable to pay his debts in full * * with intent to defeat, delay, or prejudice his creditors * * shall as against them, be utterly void."

Chattel mortgages given by debtors have been repeatedly attacked and set aside without question as to their coming within the provisions of the above enactment as a "conveyance, assignment, or transfer."

It is likely the intention of the Legislature in passing the 49 Vic. ch. 16, sec. 12 (O.) was to aid discovery under the above sec. 2 of ch. 124, and that any conveyance, assignment, or transfer whatever, given as a security or otherwise,

by a judgment debtor of his goods, chattels, and effects, which would have the effect intended to be guarded against by ch. 125, R. S. O. (1887), should be examinable into.

I have, therefore, reached the conclusion that a chattel mortgage given by a judgment debtor to a creditor is a "transfer" of the debtor's property and effects under the 49 Vic. ch. 16, sec. 12.

Lotteridge attended at the time and place appointed for his examination, but refused to be sworn or examined, on the ground that the order had not been properly obtained, and that before it was made he should have had notice of the application. He files an affidavit in which he states that on the advice of his solicitor he declined to be examined, for the reasons stated, and tendered back the one dollar conduct money paid him to Mr. Parkes, the solicitor for the plaintiff, who accepted the same. He says he had no intention in any way to disrespect the process of the Court, and attended on the appointment in pursuance of said order, to explain his position, and was under the belief that as the conduct money was returned to and accepted by the plaintiff's solicitor, and as the plaintiff announced his intention of paying off the claim of Grant & Son under the chattel mortgage, that no further proceedings would be taken for examination. He also states that he was served with a copy of the order to examine on the 18th of July, but in consequence of absence from town and press of business, and his ignorance that such an order required to be appealed from within four days, he did not bring the order to his solicitor until the 24th of July, the day appointed for his examination.

Mr. E. K. Martin, one of the firm of solicitors for Lotteridge, in his affidavit states that on the 24th of July he saw Mr. McAdam, of the firm of Parkes, McAdam, & Marshall, the plaintiff's solicitors, who spoke about paying off the chattel mortgage given by defendant to Grant & Son, and Martin, at McAdam's request, procured from Grant & Son a statement shewing amount due on the mortgage, McAdam saying if the statement was not furnished,

they would tender the amount they considered due ; that it was in view of the statement that their client's claim would be paid off, and in the belief that no further proceedings would be taken towards enforcing the order to examine, or notice of motion to commit, which, although dated the 25th of July, was not served until the 30th, that steps were not sooner taken by way of appeal from the order.

I think there is disclosed sufficient material upon which I should grant the indulgence asked for of allowing Lotteridge in to appeal. See *Dayer v. Robertson*, 9 P. R. 78 ; *Sieveurwright v. Leys*, *ib.* 200.

The appeal must be allowed, and the order of the local Master set aside. Under the circumstances there will be no costs of this motion to either party.

CUERRIER ET UX. V. WHITE.

Costs—Taxation—Appeal—Local taxing officers—Form of certificate or allocatur.

There is no need for local officers when taxing costs for the purpose of completing a judgment and issuing execution thereon (which they as local officers may also do) to preface the issuing of an execution by a formal certificate to themselves of what they have done upon the taxation. They signify clearly and sufficiently the completion of the taxation and the full discharge of their functions as taxing officers when they add up results, ascertain the correct amount payable, note the bill of costs as taxed at such a sum, with the date, and verify the whole by their signature, which is a sufficient certificate or allocatur to shew that the taxation is at an end. They have no power to alter what they have allowed or disallowed after this, except as to clerical errors, and they are then *functi officii*.

Any objections to the taxation must be carried in in writing before the signature of the officer is affixed.

Remarks upon the former practice at law and equity as to allocaturs and certificates of taxation.

[May 28, 1888.—*Robertson, J.*]

[September 6, 1888.—*The Chancery Division.*]

THIS was an appeal by the defendant from an order of the Master in Chambers refusing him leave to appeal from the taxation of two bills of costs, one that of the plaintiffs, and the other of the defendant, by the local Master at Sandwich.

The facts are fully stated in the judgment of Robertson, J., who heard the application, in Chambers, on the 26th March, 1888.

W. H. Blake, for the defendant.

Douglas Armour, for the plaintiffs.

ROBERTSON, J.—The action was brought to compel defendant to remove certain mortgages on lands, which he was bound to do; and in that action defendant counter-claimed for removal of timber, &c., by plaintiffs. The plaintiffs succeeded in their action, and obtained judgment, with costs of the action. Defendant also succeeded on his counter-claim, and damages were assessed at \$42, and the

Court ordered that he should have his costs "according to the proper scale."

On the 21st February, 1888, both bills of costs were taxed by the local Master at Windsor, and at the foot of each bill he wrote the words, "taxed at," opposite the respective amounts allowed by him, after deducting the items disallowed, and signed the same, dating each on 21st February, but it does not appear that either bill was filed on that or any subsequent day. On the said 21st February the plaintiffs filed objections under Rule 447, (Con. Rule 1230), first to the disallowance of certain items in the plaintiffs' bill, and also to the allowance of certain items in the defendant's bill; and on the same day the defendant's solicitor stated to the Master that he would also file and serve objections to the allowance of certain items in plaintiffs' bill, and to the disallowance of certain items in his, defendant's, bill, but he did not do so until the following day.

Subsequently the local Master certified, *inter alia*, the following facts, after stating the receipt by him of the several objections above mentioned: "I left the matter of the objections made by each of the parties to be proceeded upon by the parties moving in appeal in Toronto, if they decided to pursue the matter further. Some days after the taxation Mr. White, in a conversation with me in my office, said to me that I would have to state the grounds of my taxation to each of the items set forth in his lists. As I had given a great deal of time to the contentions between the parties over the various items of the bills, I expressed my unwillingness to do so."

It does not appear whether the local Master ever made or signed a certificate or allocatur of the amount of costs taxed, or if made, that such certificate, &c., has been filed; but it appears by affidavit that on the 1st March the plaintiffs sued out writs of *fi. fa.* against both goods and lands of defendant, and placed the same in the sheriff's hands, who notified the defendant on 10th March (Saturday) that the same had been placed in his hands, and

demanded payment of the amounts endorsed thereon, viz., \$276.38.

On the 14th March the defendant applied to the Master in Chambers at Toronto for leave, and it was given, to apply on 15th March for liberty to appeal from the taxation and a stay of execution, &c.—setting forth the grounds of appeal—and on the 22nd March the Master in Chambers dismissed the application with costs, and that order was made, as set out in the same, “upon reading the pleadings and proceedings had and taken in the action, and the judgment entered herein, the report of the Master, the bills of costs, *and the Master’s certificate of taxation*, and the affidavit of the defendant filed in support of the application, and the affidavit of Duncan Dougall, and the certificate of the said local Master at Sandwich, filed in answer thereto, and upon hearing both parties by,” &c.

From this order the defendant appealed to the presiding Judge in Chambers, and the matter came up before me on 26th March.

On the argument it was stated and admitted that no formal certificate or allocatur of amount of costs taxed had ever been made by the local Master at Sandwich; that the only documents which shewed that the costs had been taxed were the respective bills of costs of the plaintiffs and defendant, which are respectively signed by the local Master, and which, on examination, shew that the plaintiffs’ bill was made up in this way :

The total amount of solicitors’ fees and disbursements are stated to be	\$781 71
Taxed off.....	343 45
	<hr/>
Taxed at	\$438 26
Deduct damages to defendant	\$42 00
“ defendant’s costs taxed	154 78
	<hr/>
	196 78
	<hr/>
	\$241 51

Windsor, February 21, 1888.

S. S. MACDONELL,
Local Master.

And the defendant's bill is also added up, and
the total amount of fees and disbursements are
stated to be..... \$313 73
Taxed off 158 95

Taxed at..... \$154 78
Windsor, February 21, 1888.

S. S. MACDONELL,
Local Master.

But neither of these bills appears to have been filed, although they were retained by the local Master, and have been sent by him on præcipe to the Clerk of Records and Writs.

It will be observed that the local Master, according to his own statement, contravened the Rule 448, having declined to reconsider and review his taxation, upon receiving the written objections filed with him on 21st and 22nd July, which declares he "*shall*" reconsider, &c. And he was also in error in issuing the writs of *fi. fa.* against goods and lands, without first issuing his certificate or allocatur, and stating either therein or by reference to the objections, the grounds and reasons of his decision thereon. The learned Master in Chambers, however, held that the signing of the bills of costs in the manner stated, was, under the circumstances, a certificate or allocatur, and as the objections were not put in before that was done, the right to appeal was gone, and that is really the question now before me. I have had the advantage of an interview with the learned Master, and with the greatest respect for his opinion and judgment, I regret that I am unable to bring myself to the same conclusion.

On the argument it was contended by counsel for plaintiffs that signing the bills of costs by the taxing officer in the country, was and is the only "certificate or allocatur" ever given outside of the home office; that it is only in Toronto that a certificate is necessary, as the taxing officer there does not enter judgment or issue execution, &c. If that is the universal practice, in my judgment it is not

a compliance with Rules 447, 448, and 449, for the manifest reason that the signing of a certificate is an independent act, in fact is a formal report of the result of the taxation by the officer taxing the costs, and who for that purpose is not acting in his capacity as Master, but as local taxing officer; the signing of the bill after taxation merely amounts to an act which shews to the party against whom the bill is taxed, that the taxing officer has allowed and disallowed certain items in the bill as taxed; and until that is settled by signing the bill, the party objecting cannot specify, with certainty, his objections; and besides, the objecting party is entitled to a reasonable time to formulate his objections; and in this case the taxing officer was informed that objections would be given in writing, and they were given within a reasonable time, and before execution was issued—it does not appear when judgment was entered—these objections having been given, it was the duty of the taxing officer to consider them, and having been requested to state his reasons for disallowing or allowing the items objected to, he should have complied with the rule in that behalf. I am therefore clearly of opinion that in all cases, a “certificate or allocatur” should be given by all taxing officers, whether in the country or at the home office in Toronto, and this view is confirmed on reference to the form of the executions given and used in all cases, in which it is expressly declared that the costs have been taxed at the sum mentioned “as appears by the certificate,” &c.: *Langtry v. Dumoulin*, 10 P. R. 444, and cases there cited and relied upon; *Gall v. Collins*, 12 P. R. 413. The defendant was not therefore in a position to appeal, but the taxing officer having refused to grant a certificate with his reasons, &c., as requested, for allowing and disallowing, and the executions being placed in the sheriff’s hands, I think the Master should have stayed the executions until the taxing officer complied with the rule. The defendant seems to have done all that he could before the taxing officer; he applied for the certificates and the reasons, &c., but this was denied him, according to what he

himself has certified for use before the Master in Chambers. According to his affidavit, the defendant did not understand him to go so far, and the defendant was evidently misled into supposing that the certificates would be granted.

It is somewhat difficult to say what really should be done in the matter, as it now stands, but after examining the plaintiffs' bill of costs as taxed, it appears to me probable that some of the objections taken by the defendant thereto are worth considering; but on this point I must not be understood as having come to any conclusion which should bind the parties, as they have not been heard before me on that point; but I do think the executions should be stayed, but not so as to interfere with the plaintiffs' priority, (although that now cannot affect them, as the Creditors' Relief Act will affect the matter) until the local taxing officer complies with Rule 448, so that defendant can properly exercise his right of appeal, when he can bring the matter before a Judge of the High Court.

Under the circumstances, I think the order of the learned Master in Chambers of 22nd March, 1888, should be abrogated, but I allow no costs to either party on this application.

The plaintiffs appealed from the foregoing decision, and the appeal was heard by a Divisional Court composed of of Boyd, C., and Ferguson, J., on the 12th June, 1888.

Hoyles, for the plaintiffs.

C. J. Holman, for the defendant.

Judgment was delivered on the 6th September, 1888.

BOYD, C.—This appeal is on a point of practice which, though minute, involves the regulation of the course of procedure in the offices of local taxing officers. The provisions of Rules 447–449 are borrowed from England, and apply to officers whose exclusive functions are to tax costs, and certify the results to other officers by whom action is to be

taken on the certificate or allocatur. Allocatur (meaning "it is allowed") is the old common law equivalent for that which was called in Chancery the certificate of taxation. The rules were framed so as to give more precision to the old practice in appealing from taxation. During this taxation the party objecting raises his points for the ruling of the officer; at the end of the taxation, if the officer has gone against him, and he wishes to appeal, he is to put his objections in writing before the allocatur is signed; upon these written objections, the taxing officer is to pass and to dispose of them by giving the grounds and reasons of his decision, which may be in his allocatur. Then the review of or appeal from the taxation is to be prosecuted in respect only of these written objections. The Court will not entertain an application to review the taxation till the Master has made his allocatur, because previously thereto he has come to no final decision. Until the allocatur is given he may alter his mind, and he is not bound by any declaration he may have made as to what costs he intends to allow: *Marshall* on Costs, 330, 2nd ed.

At law the practice was not to proceed by way of formal allocatur where the taxation was upon a judgment. In *Hullock* on Costs, p. 653, it is said: "At this day (1810) costs are taxed * * by the Master * * upon the attorneys or agents of the parties attending at the respective offices for that purpose. After the taxation, the Master * * marks the amount of the costs on the *postea*, inquisition, or demurrer-roll, as the case may be, when final judgment is said to be signed, and the successful party may immediately take out execution. * * If either party be dissatisfied with the taxation of costs, he may obtain the judgment of the Court upon the question, by a motion for the officer to review his taxation."

Where the taxation was upon a rule of Court or the like, then, in order to enforce the payment by way of attachment, a copy of the rule with the officer's allocatur thereon was to be personally served upon the party liable: *ib.* p. 652.

In Chancery the old practice was to embody the results of the taxation in a formal report to the Court, which, being filed and confirmed, was enforced according to the usual course: *Wyatt's Practical Registry*, 146 (1800).

According to the modern practice in England, as given in *Daniell*: "When the taxation is completed, the Master signs the bill. If it is intended to enforce payment of the costs by any further proceedings, or evidence of the amount is required, the items are added up, and the result of the taxation ascertained by the solicitors, and checked by the Taxing Master's clerk; and a certificate of the taxation must be obtained from the Taxing Master, and filed in the Report Office, and an office copy taken:" 5th ed., vol. ii., pp. 1314, 1315. In a note to this passage it is stated, "where the bill is taxed on a direction from Chambers, * * no certificate of the taxation is required; but a memorandum of the Taxing Master's opinion thereon is written at the foot of the bill, and signed by him, and returned to the Chambers."

The present Rules (those now in question) in the Judicature Act, are reproductions of certain English Consolidated Orders. Thus our Rule 447 is nearly the same as 40th Consolidated Order, Rule 33. The chief difference is this, that in the English order the manner of application to the officer to review his taxation before the certificate is signed is by means of a warrant therefor. The 40th Consolidated Order, Rule 34, begins, "upon his application for such warrant, or upon the return thereof," the taxing master shall reconsider and review, and then proceeds as in our Rule 448. And Rule 449 is identical with Consolidated Order 40, Rule 35.

There is no need for these local officers, when taxing costs for the purpose of completing a judgment and issuing execution thereon, (which they as local officers may also do), to preface the issuing of an execution by a formal certificate to themselves of what they have done upon the taxation. They must complete the taxation and dispose of all objections made before them before they can

take the next step, but they signify clearly and sufficiently the completion of the taxation, and the full discharge of their functions as taxing officers, when they add up results, ascertain the correct amount payable, note the bill of costs as taxed at such a sum, with the date, and verify the whole by their signature. *That* marked at the foot of the bill of costs is a sufficient certificate or allocatur to shew that the taxation is at an end. They have no power to alter what they have allowed or disallowed after this (except of course as to clerical errors) and they are, to all intents and purposes, *functi officii*s.

The party who wishes to intercept this action should do so before the termination of the taxation has been reached and state that he wishes to renew the objections already verbally made by him, and overruled during the progress of the taxation, by placing the same in writing before the officer; that he may have the benefit of the rules in getting a reconsideration by the officer, and if that is still adverse, the further benefit of an appeal to the Judge under the Ontario statute.

The question being new and of difficulty, owing to some uncertain *dicta*, it will be proper while allowing the appeal, to do so without costs.

FERGUSON, J.—It appears to have been assumed from the beginning, and all the way through the proceedings that have been had, that the practice which is found in marginal Rules 447, 448, and 449, is applicable to this case; and, looking at the facts of the case as disclosed, at these three rules, and at the provisions of the 22nd sec. of 48 Vic. ch. 13 (O.), I do not perceive any sufficient reason for saying that it is not so applicable, although in some of the reported cases this seems to have been doubted. It is true that these rules had their existence before the passing of 48 Vic., and sec. 22^a commences by saying “subject to any rules of Court which may hereafter be made in this behalf,” but in the same clause is the provision, “subject only to appeal to a Judge of the High Court”; and I think

this appeal is an appeal according to existing practice, and is similar to the application to a Judge at Chambers for an order to review the taxation as to the items or parts of items "that may have been objected to as aforesaid," mentioned in Rule 449. Which last, I think, means: objected to as in Rule 447; and according to the provisions of this Rule, the objections must be delivered to the other party interested therein, and carried in before the taxing officer in writing, and in the form indicated in the Rule, before his certificate or allocatur is signed, in order that effect should be given to the objections.

What the local Master who taxed the bill of costs in the present case did on the 21st of February, 1888, is fully stated in the judgment of my brother Robertson, now under review, and it is not necessary that I should make another statement of it here. That learned Judge says that it does not appear that the local Master ever made or signed a certificate or allocatur of the amount of costs taxed in the case, or if made, that such certificate, &c., was ever filed, and that it was stated before him on the argument that no *formal* certificate or allocatur of the amount of costs taxed had been made by the local Master. In another part of his judgment the learned Judge says that the real question is, whether or not the objections were put in before a certificate or allocatur had been signed; and he says that the Master in Chambers in Toronto was in error in holding that the signing of the bills of costs in the manner stated was, under the circumstances, a certificate or allocatur.

As the local Master was the officer before whom further proceedings after taxation would be had, there was no need of his certifying or reporting the taxation to the Court or any one else. An allocatur was all that it was necessary for him to make or sign, and the words "certificate" and "allocatur" occur side by side in the Rule 447. It seems clear that the objections in writing were not "carried in" before the local Master prior to his doing and signing what he did do and sign and date on the 21st of February.

The question then arises as to whether or not this was an "allocatur," and it seems to me that upon the answer to this question depends the proper conclusion upon this appeal; for if it was and is an allocatur, the objections in writing, if any, were too late to answer the requirements of the rule, and besides after having signed his allocatur, the local Master was, I think, *functus officio* as to the then immediate matter.

In *Mansel* on Costs, at p. 54, this passage occurs: "As soon as the taxation is complete, and the amount of it, by deducting the charges struck off from the gross amount, ascertained, the taxing officer adds thereto his fee for taxing, and the whole is added up and a total found, and then if upon a postea, or writ of trial, an allocatur is made out thus." Then follows the form used in the Queen's Bench, that used in the Common Pleas, and that used in the Exchequer Court. These forms are simply figures under the expressions, "for increased costs," "damages on the whole," and the like. The author then proceeds: "This minute is termed the "allocatur" of costs; and when signed by the Master and dated, is delivered by him to the attorney for the plaintiff or party in whose favor it is made, and it then becomes the property of the plaintiff. Final judgment is now considered as signed, and the costs so taxed now form part thereof."

In *Hullock's* Law of Costs, at p. 653 (referred to by the Chancellor in his judgment), it is said that the amount of costs is marked on the postea, inquisition, or demurrer-roll, as the case may be, when final judgment is said to be signed.

In *Daniell's* Chancery Practice, 5th ed. 1314, the completion of the taxation is thus spoken of: "When the taxation is completed, the Master signs the bill. If it is intended to enforce payment of the costs by any further proceeding, or evidence of the amount is required, the items taxed are added up, and the result of the taxation ascertained by the solicitors, and checked by the Taxing Master's clerk; and a certificate of the taxation must be obtained from the

Taxing Master, and filed in the Report Office, and an office copy taken." But, as I have before said, the further proceedings in the present case, if any, were to be taken before the taxing officer himself in his office, and there could be no need of any such certificate, or of any such office copy. Allocatur, the word used by the legislature, is thus defined in *Bowvier's Law Dictionary* : "A word denoting the allowance by a master or prothonotary of a bill referred for his consideration, whether touching costs, damages, or matter of account." In other dictionaries, such as *Sweet's* and *Wharton's*, it is defined as a certificate of the result of a taxation of costs, or of the allowance of costs, upon a taxation of the same.

After having compared what was done by the taxing officer in the present case with the forms of allocatur given in *Mansel* on Costs, in the light of what is said in the books that I have referred to, and exercising the best judgment I can upon the subject, I am of the opinion that the taxing officer made his allocatur, and signed the same on the 21st of February, and as I have said, it is clear and not disputed that the objections of the defendant were not carried in in writing before this act was done, and that the defendant was therefore not in a position to ask the taxing officer, when he did so, to review his taxation in respect of the items then objected to. It follows that he was not in a position to apply in Chambers as he did.

The result, I think, is, that the appeal before us must be allowed.

I may add that the matter raised for decision has proved to me somewhat troublesome, and I am by no means surprised at the conclusion of my brother Robertson, although I am unable to adopt the same view.

I agree that there should be no costs of the appeal.

EDWARDS V. EDWARDS.

Costs, security for—Garnishing matter—Evidence of residence out of jurisdiction.

In an issue between a judgment creditor and a garnishee as to the liability of the latter to the judgment debtor,
Held, that there was power to order security for costs ; but
Held, that the refusal of the solicitor for the judgment creditor to disclose his client's place of abode was not sufficient evidence of his living out of the jurisdiction to support such an order.

[September 26, 1888.—*Ferguson, J.*]

AN appeal by the plaintiff, a judgment creditor of the defendant, from an order of one of the local Judges at London, requiring the appellant to give security for the costs of the Methodist Church, garnishees, of an issue directed between the judgment creditor and the garnishees as to the liability of the latter to the judgment debtor.

The appeal was upon two grounds : (1) That the practice did not warrant the ordering of security for costs in such an issue ; and (2), that the evidence before the local Judge that the appellant lived out of the jurisdiction was not sufficient.

There was no positive evidence before the Judge that the appellant lived out of the jurisdiction, and the motion was based upon a refusal of the solicitor for the appellant to say where his client lived. The solicitor failed to answer a demand of residence served upon him ; and also when before the local Judge, and upon appeal, declined to state where his client lived.

The appeal was argued in Chambers on the 24th September, 1888.

E. R. Cameron, for the appeal.

Shepley, contra,

Canadian Bank of Commerce v. Middleton, 12 P. R. 121 ; *Swain v. Stoddart*, 12 P. R. 490 ; and Con. Rules 935-945, were referred to.

FERGUSON, J.—Having perused the rules and authorities referred to, and considered the matter as well as I have been able, I am of the opinion that the Methodist Church, the defendants in this issue, on proper evidence of the residence abroad of the judgment creditor, plaintiff in the issue, would be entitled to security for costs; but I think the evidence on which the order was made was not sufficient. From the circumstances there can be little, if any, doubt that the fact is so, but there should be some legal evidence of it. On this ground and only on this ground, the appeal will be allowed, but without costs; with leave, if any leave is necessary, to the Methodist Church to apply for security for costs.

Order accordingly.

COLE V. HALL.

Mechanic's lien—Execution creditor—Priority—Master's office.

An execution creditor whose writ of *fi. fa.* lands is placed in the sheriff's hands subsequent to the registration of a mechanic's lien, but prior to the institution of proceedings by action thereunder, is a subsequent not a prior incumbrancer to such lien, notwithstanding that he is not made a party to such proceedings within the period of ninety days prescribed by the Mechanic's Lien Act.

Such a creditor is properly made a party in the Master's office.

[September 24, 1888.—*Ferguson, J.*]

A petition under Con. Rule 127 to set aside an order making one Rogers a party defendant in the office of the Master in Ordinary.

The facts sufficiently appear in the judgment.

C. Millar, for Rogers, who was made a party in the Master's office.

Hoyles, contra, supporting the order making Rogers a party.

FERGUSON, J.—The action is to enforce a mechanic's lien. The Master made Rogers a party and caused him to be served with the usual papers in such cases and in the usual way. This application made by Rogers comes on by way of a motion for judgment on the petition, he, Rogers, asking that the order making him a party in the Master's office be rescinded, on the ground, amongst others, that he was a prior and not a subsequent incumbrancer, and that, if a proper party at all, he should have been made a party in the first instance, that is, at the commencement of the action. As will be seen hereafter, this question is not one reaching to mere matter of form, but is, in this case, of much importance. The regularity of this application is not questioned. The plaintiff's lien was filed on the 29th day of October, 1887; and for the purposes of this petition, it must here be assumed that it was a valid lien, and that it accrued and had its existence prior to that date.

Rogers placed his writ of *feri facias* against lands in the hands of the sheriff (to be executed) on the 3rd day of November, 1887.

The plaintiff commenced this action upon his lien for the enforcement of it on the 30th day of November, 1887, and within the period of ninety days prescribed by the Act commonly known as the Mechanics' Lien Act, or, at all events, within this period as against all persons made parties in the first instance, and it was admitted that a *lis pendens* was duly registered. In short, it was not disputed that the plaintiff had taken all the steps that were necessary to preserve his lien, except that he had not made Rogers a party defendant in the writ; the contention being that the lien is nevertheless void as against Rogers, because no action to enforce it was brought against him within the prescribed period of ninety days.

The judgment in the action was obtained on the 14th of May, 1888, and the order of the Master in his office making Rogers a party was made on the 21st of August, 1888, and long after the period of ninety days.

A mechanic's lien, as I understand the matter, is given

by the statute, and arises and has its existence when the required acts or facts take place. Such a lien was the lien in this case. If the lien-holder desires to preserve his position and establish a priority over subsequent purchasers or mortgagees, he must register his lien; see *Reinhart v. Shutt*, 15 O. R. 325; and I apprehend subsequent execution creditors who have placed their writs in the hands of the sheriff, occupy a position in this respect somewhat analogous to subsequent purchasers and mortgagees.

The lien in the present case had its existence, and it is conceded that no act of the lien-holder was left undone to preserve his position and priority as against subsequent purchasers, mortgagees, &c., up to the time at which Rogers placed his execution in the hands of the sheriff to be executed; and I cannot see how it can be successfully contended that Rogers when he placed his writ in the sheriff's hands acquired a position or right higher than that of an incumbrancer subsequent to the claim of the lien-holder, the present plaintiff. He was, I think, at the time this suit was commenced a subsequent incumbrancer upon the property in question. The prescribed period of ninety days had not then expired, but it did expire before he was made a party in the Master's office.

Section 13 of the Mechanics' Lien Act, as it then stood, provided that such a lien as the plaintiff's might be realized in the Court of Chancery according to the ordinary procedure of the Court.

Section 21 of the same Act provided that such a registered lien should absolutely cease to exist after the expiration of this prescribed period of ninety days, unless in the meantime proceedings were taken to realize the claim under the Act.

Rogers contends that as to him no such proceedings were taken within the period.

The practice or mode of procedure in the Court of making subsequent incumbrancers parties in the Master's office is familiar to every practitioner. Many of the cases having

reference to it are referred to in Mr. Holmsted's Rules and Orders, 244 and 245, under Order 444. So far as appears, and according to the facts that are admitted or not disputed, the plaintiff had before the expiration of the ninety days, taken proceedings to realize his claim, which proceedings were, I think, then properly constituted according to the ordinary practice and procedure of the Court.

Rogers, however, says that, even if this much be assumed against his contention, yet, inasmuch as he was not made a party in the Master's office till after the expiration of the ninety days the proceeding does not affect him, and that as to him it must be held that the plaintiff's lien has ceased to exist. I cannot bring myself to adopt this view, which would be saying to the plaintiff, who, under section 13, is at liberty to employ the ordinary procedure of the Court, that in order to save the existence of his lien, he must not only have taken the proceedings to realize it within the ninety days, but that he must also within the same period of ninety days have so far progressed in the prosecution of the proceedings as to have made all subsequent incumbrancers parties in the Master's office, when in many contested cases it might be impossible for a plaintiff so to do.

In the case *Bank of Montreal v. Haffner*, 10 A. R. at 597, the learned Judge (Osler, J. A.) in delivering what may be considered the judgment of the Court, said: "I think that by instituting proceedings to realize a claim, is meant that they shall be instituted against all parties whose interests are to be affected by such proceedings"; and immediately after this, he says: "There can be no doubt that a mortgagee is a necessary party to any action in which his security is to be affected, and the land comprised in it sold *in invitum* as regards him." In Mr. Cassels's Digest at page 288, there is a note respecting the decision of the Supreme Court in the same case, which is as follows: "The period of ninety days * * for the commencement of proceedings to enforce the lien applies to an action or proceeding against a mortgagee or other person claiming an interest in the lands, and that whether proceedings have or have not

been previously taken against the owner within the ninety days." The case in the Supreme Court is not, I think, elsewhere reported. In that case, however, the action was against a prior mortgagee for the purpose of enforcing a right of lien given by the Act against such prior mortgagees, and the action was brought after the expiration of the ninety days, the plaintiff having within the ninety days brought his action against the "owner" to realize his claim under the Act, a case differing very widely indeed, as I think, from the present one, and I think the language there used should be read as having reference to the facts then under consideration, and not as governing, or having been intended to govern, cases the facts of which are so materially different from those facts as are the facts of the present case.

In *McVean v. Tiffin*, 13 A. R. 1, the question arose with a prior mortgagee, as also in *Richards v. Chamberlain*, 25 Gr. 402. In *Reinhart v. Shutt*, 15 O. R. 325, the petitioner was held to be a prior mortgagee also.

In Mr. Holmsted's work, entitled "The Mechanics' Lien Act, 1887," pp. 92 and 93, the learned author seems to be of the opinion, or at least offers the view, that if what is said in *Bank of Montreal v. Haffner* is carried to a logical conclusion, it would shew that a plaintiff in taking the proceedings to realize his lien would be driven to adopt the old practice of the Court in mortgage suits, and make all parties interested parties in the first instance with the exception of lien-holders of the same class as the plaintiff himself.

This may well be the case if the language alone is looked at; but I cannot avoid thinking that such a conclusion would deprive a plaintiff of the benefit or a part of the benefit given him by the 13th section, which authorizes him to take his proceedings according to the ordinary procedure of the Court, which means, I think, the then present course of procedure or practice.

I am of the opinion that this application should be dismissed, and I base my conclusion upon what appears to me

to be the fact, that before the expiration of the ninety days the plaintiff had taken proceedings to realize his lien by an action properly constituted according to the practice and the "ordinary procedure" of the Court, and was not bound, in order to save the existence of his lien, to have all parties to be added, made parties in the Master's office before the expiration of that period.

I cannot view this point of contention otherwise if I give the plaintiff the benefit of the 13th section of the Act, as it then stood, and this I am bound to do. I do not think the contention, or rather the objection, respecting the *ex parte* proceedings in the Master's office in vacation can be sustained.

The petition will be dismissed, with costs.

[This case has been carried to the Court of Appeal.]

DONEGAN V. SHORT.

Arrest—Ca. re.—Breach of promise—Statement of damage—Corroboration—Discharge of defendant.

In an action for breach of promise of marriage the defendant was arrested under a *ca. re.*, the order for which was granted upon an affidavit which did not swear to any amount of damage. Upon a motion to discharge the defendant from the custody of his bail, he denied the promise of marriage, and the plaintiff filed no affidavit corroborating her own. The intent of the defendant to leave the country rested on alleged admissions made by the defendant to the plaintiff, which he denied, and he also brought forward a strong fact against his likelihood to abscond from the Province.

Held, that, under these circumstances, the defendant should be discharged, and the bail bond delivered up to be cancelled.

[September 19, 1888.—*Boyd, C.*]

THIS was an application by the defendant for an order discharging him from the custody of his bail, and directing that the bail bond be delivered up to be cancelled. The arrest of the defendant was under a *ca. re.*, issued in an action for breach of promise of marriage.

The application was argued before Boyd, C., in Chambers, on the 17th September, 1888.

W. M. Douglas, for the defendant.

Middleton, for the plaintiff.

BOYD, C.—The original affidavit of the plaintiff on which the order for arrest was made was deficient in two statutory requirements: it omitted to swear to any cause of action, and it omitted to swear to any amount of damage. Upon the further materials before me, the first only is remedied, but not the second. The complaint is for alleged breach of promise of marriage, which the defendant emphatically denies. It may be said that no certain damages can be sworn to in such a case by the plaintiff; but she can at least pledge her oath to her belief that she has suffered damage to not less than the amount fixed by the statute as the limit under which a *capias* is not to issue.

The plaintiff does not now file any affidavit shewing corroboration by some material evidence, other than her own, in support of the promise, as required by the Witnesses and Evidence Act in such cases as this (R.S.O., 1887, ch. 61, sec. 6.) True, that is only in order to recover a verdict; but it appears to me a strange omission where the original affidavit swears to no cause of action, and the alleged cause stated in the indorsement of the writ is denied under oath by the defendant, that doubt should be left on such a point by the plaintiff.

Again, the intent to leave the country rests on alleged admissions made by the defendant to the plaintiff, which he denies. He further brings forward a strong fact against his likelihood to abscond from the Province, in that he gets a valuable interest in land under his father's will, if he remains on the land with his mother, and works the place till the year 1890. He has for seven years fulfilled the conditions of the will, but the advantage of this work he would lose, and the land he would forfeit, if he stopped short of the full period of service.

I am so impressed with all the circumstances of this case that I exercise the jurisdiction given by the statute of discharging the defendant from the custody of his bail, and directing the bail bond to be delivered up to be cancelled. Costs in any event to the defendant in the cause.

RE HORNIBROOK.

*Sale of land—Order of Court in infancy matter—Default of purchaser—
Re-sale.*

In a matter pending before the Court concerning the sale of infants' lands, an order was made directing the acceptance of an offer to purchase the lands, which had been made before the matter came into Court. The purchaser having made default, the Master in Chambers made an order for payment of the purchase money, and in default for a re-sale, and payment by the purchaser of any deficiency.

An appeal from this order on the grounds that the contract provided a penalty for default, viz., forfeiture of the deposit, and that the practice followed was not the proper one, as the sale was not under the standing conditions of the Court, was dismissed.

[October 3, 1888.—*Boyd, C.*]

AN order had been made in this matter directing the sale of lands in which an infant was interested, and on May 14th, 1888, Robertson, J., made an order on consent of all parties, that the offer of one Walter Shirley, dated May 5th, 1888, to purchase the land in question be accepted, with a reference to the Registrar of the Queen's Bench Division to settle the conveyance, &c. It appeared that the offer to purchase had been made before the matter came into Court.

This was an appeal from the order of the Master in Chambers directing payment of the purchase money, and, in default, a re-sale, and for payment by the purchaser of the deficiency, if any, on such estate.

Masten, for the purchaser, (appellant), contended that the order of the Master in Chambers should not have been

made, because the contract provided a remedy for its breach, viz., forfeiture of the deposit, and because this was not a sale under the standing conditions of the Court.

Beck, contra.

BOYD, C.—The order appealed from is supported by the judgment of Bacon, V. C., in *Noble v. Edwardes*, 5 Ch. D. at p. 388, where he holds that, in the absence of express stipulation, the law implies a contract that the vendor shall be at liberty to re-sell if the contract is rescinded, and provides the remedy which is now being applied in this case, of requiring the defaulting purchaser to make good the deficiency. This exposition of the law has passed into the text books: 1 *Dart*, 6th ed., 184-5; and *Mayne on Damages*, 3rd ed., p. 176; and it commends itself as a reasonable and proper provision to be implied. It would be unquestionably worked out in a more expensive and circuitous way by declaring the contract rescinded, and giving a lien for the purchase money, which would be then realized by sale, and any deficiency after sale would have to be made good by the defaulting purchaser. The Court is now seised of this matter, and can deal summarily with it, both in ease of the vendor and in mercy to the purchaser. I overruled the other points appealed at the close of the argument, and now overrule this, and affirm the Master's judgment with costs.

ELLIOTT V. CANADIAN PACIFIC RAILWAY COMPANY ET AL.

Evidence—Sole witness of accident giving rise to action—Examination before trial.

In an action under Lord Campbell's Act, an order was made for the examination before the trial, *de bene esse*, on behalf of the plaintiff, of the only witness to the accident which occasioned the death of the deceased. It was provided that the examination should not be used at the trial unless the plaintiff was unable to procure the attendance of the witness.

[October 12, 1888.—*The Master in Chambers.*]

AN application on behalf of the plaintiff for an order for the examination, *de bene esse*, of one Breen, alleged to have been the sole witness of the accident which caused the death of the plaintiff's husband, and in respect of which she brought this action under Lord Campbell's Act.

The solicitor for the plaintiff made an affidavit that after having made careful inquiry into all the circumstances, he believed that Breen, was the only witness to the accident.

J. H. Ferguson, for the motion, cited *Lord Cholmondeley v. Earl of Oxford*, 4 Bro. C. C. 157; *Pearson v. Ward*, 2 Dick. 648.

Douglas Armour and *W. H. Wallbridge*, for the defendants, cited *Hope v. Hope*, 3 Beav. 317; *Jameson v. Jones*, 3 Ch. Chamb. R. 98.

THE MASTER IN CHAMBERS.—This is an application to examine a witness for the plaintiff upon an unusual ground, simply that he is the only witness to the main fact in the case.

It is an action under Lord Campbell's Act, and the witness is the only witness to the accident to the deceased, from which his death occurred.

I am fully conscious of the inconvenience—and even danger—of allowing too lax a practice in such a case. It would lead to enormous expense, and to attempts, at any rate, to examine all the principal witnesses in a contested case before the trial.

But I can see that justice must absolutely require such an examination in some cases.

And I think now, that the necessary facts are made out which require me to grant the order for the examination which is sought. It is no more than an exercise of reasonable prudence in the plaintiff to seek it.

If justice requires it in this case, it is not the fear of any thing that may follow from the precedent that should restrain me from granting it. All that can be said is, that the circumstances of each case in which such an application is made must be narrowly examined.

If the plaintiff can call the witness at the trial, she must do so. The examination must only be used upon her inability to have him present.

A suit may be in proper circumstances sustained to perpetuate testimony.

The following are additional cases on the point: *Shirley v. Earl Ferrers*, 3 P. Wms. 77; *Rowe v. ———*, 13 Ves. 261; *Dursley v. Berkeley*, 6 Ves. 251.

CUTLER V. MORSE.

Costs—Unnecessary counter-claim.

To an action on a building contract the defendant set up the defence that the work was incompletely and unskilfully done, and counter-claimed for damages by reason thereof. The Master to whom the action was referred found that \$177 should be deducted for unskilful and incomplete work from the amount claimed by the plaintiff, and that the defendant had suffered damage to the extent of \$177.

Held, that the questions raised by the defendant might have been raised in a similar action before the Judicature Act, and that he was not entitled to have the costs dealt with as if what he had set up was properly a counter-claim.

[October 4, 1888.—*Armour*, C. J.]

THIS was an action on a building contract. The defence was, that the work of the plaintiff was unskilfully and negligently done; and that the plaintiff failed to put in a

hoist, which he had contracted to do, and the defendant was obliged to put it in himself; and the defendant counter-claimed for damages on account of the matters set up in the defence. The action was referred to the local Master at Welland, who made his report finding that the plaintiff was entitled to what he claimed upon his contract, less the sum of \$177, which was to be deducted for unskilful and incomplete work; and he also found the defendant's damages upon his counter-claim to be the same sum, \$177.

On the 2nd October, 1888, *W. M. Douglas*, for the plaintiff, moved before Armour, C. J., in Court, for judgment, on the report of the referee, and contended that the plaintiff should have the costs of the action, and the defendant no costs.

Middleton, for the defendant, contended that he was entitled to the costs of his counter-claim.

Judgment was delivered on the 4th October, 1888.

ARMOUR, C. J.—According to the pleadings and the report the Master, no question arose in this case which could not have been raised and determined herein had the action been brought before the Judicature Act. I do not think, therefore, that because this action was brought since the Judicature Act, and the defendant has chosen to call, in his statement of defence, that a counter-claim which is not properly a counter-claim, he is entitled on that account to have the costs dealt with as if it were properly a counter-claim.

The plaintiff is entitled to judgment for the amount found due by the Master, with costs to be taxed upon the same principle as they would have been taxed in like case before the Judicature Act.

I refer to *Lowe v. Holme*, 10 Q. B. D. 286; *Lund v. Campbell*, 14 Q. B. D. 821; *Hawke v. Brear*, 14 Q. B. D. 841.

HAY V. JOHNSTON.

Judgment—Summary order for, upon money demand—Leave to proceed upon another claim.

There may be two judgments in one action.

Leave was given to the plaintiff to sign judgment under Con. Rule 739 for the amount of a money demand, and to proceed upon another claim in the same action.

[September 10, 1888.—*Boyd, C.*]

A MOTION by the plaintiff for judgment under Con. Rule 739, formerly Rule 80, referred to a Judge by the Master in Chambers.

The writ of summons was indorsed to recover the amount of a bill of exchange, and also to set aside a conveyance as fraudulent.

Hoyles, for the motion, cited *Huffman v. Doner*, 12 P. R. 492, and *Bissett v. Jones*, 32 Ch. D. 635.

No one contra.

BOYD, C., held, following the principle of his own decision in *Huffman v. Doner*, in preference to the decision of Ferguson, J., in *Standard Bank v. Wills*, 10 P. R. 159 that there might be two judgments in the action; and therefore made the order for judgment under Rule 739, upon the money demand, with leave to the plaintiff to proceed upon his other claim.

FOSTER V. VAN WORMER.

*Judgment debtor—Examination—Duty of debtor—Unsatisfactory answers—
Notice of motion to commit.*

It is the duty of a party who is examined as a judgment debtor to furnish such explanation about his affairs as will place his dealings in an intelligible shape, and not leave his creditors to find out, as best they may, what it is the business of the debtor to make clear.

Nor is it enough for the debtor to say, touching any particular transaction, that he does not know or does not remember, if he have the means at hand to qualify himself to explain.

A notice of motion seeking relief against a party for giving unsatisfactory answers on his examination should particularize the answers complained of.

Precision should be used on the examination in ascertaining the exact state of facts, as shewn in books or accounts, and care exercised that there is no uncertainty as to any dates or amounts in question, as the Judge can only look at what is proved or admitted.

On the state of facts referred to in the judgment, the defendant was ordered to attend and be further examined at his own expense and to pay the costs of a motion to commit him for unsatisfactory answers.

Ex parte Bradbury, 14 C. B. 15, and *Ex parte Moir*, 21 Ch. D. 61, followed. *Crooks v. Stroud*, 10 P. R. 131; *Lemon v. Lemon*, 6 P. R. 184; and *Hobbs v. Scott*, 23 U. C. R. 619, discussed.

[October 16, 1888.—*Boyd, C.*]

THIS was a motion by the plaintiff and other judgment creditors of the defendant, to commit him for giving unsatisfactory answers and making insufficient disclosure upon his examination as a judgment debtor under R. S. O. (1877) ch. 50, sec. 305.

The motion was argued in Chambers on the 1st October, 1880.

A. R. Creelman and *Macrae*, for the motion.

Walter Barwick, contra.

Schneider v. Agnew, 6 P. R. 338, and *Re Courtney*, 3 L. T. N. S. 899, were referred to, in addition to the cases mentioned in the judgment, which was delivered on the 16th October, 1888.

BOYD, C.—Were I compelled to dispose of this application upon the materials now before me, I should be unable to say that the defendant had made satisfactory answers

within the meaning of the statute R. S. O. 1877, ch. 50, sec. 305. I have read over the 237 pages of the defendant's examination, and the result of the whole is, that it leaves a most unsatisfactory impression on my mind. At present, I am not satisfied that the defendant's property has been rightly and legally dealt with by him, and it has certainly not been accounted for in a proper and business-like way. It is the duty of the defendant to furnish such explanation as will place his dealings in an intelligible shape. It is not to be left to the creditors to find out as best they may, what it is the business of the defendant to make plain. It is clearly not impossible for the defendant to take such trouble as will enable him to do this, if he cannot do it now. He has friends, book-keepers, brothers-in-law, who aided in his business transactions; he has books, papers, and vouchers within his reach, by means whereof, according to his own admissions, all can be traced out and cleared up. If he will not take pains to exhaust these sources of information, he need not be surprised if it be concluded that he is evading the reasonable inquiries of his creditors and trifling with the forbearance of the Court. Passing for the present the unexplained losses of his auction business, a convenient starting point for elucidation is supplied in, May, 1887, when he seems to have had by his own statement a clear capital of \$8,000. From that date till the suspension of the Central Bank on 15th November, he appears to have had at his credit in the bank over sixty-six thousand dollars. The burden lies upon him of giving some credible and detailed account of what he did with this large sum of money.

The burden rests upon him also of clearing up the difficulties which surround his statement of the 19th November, prepared after the suspension of the bank, and to a greater or lesser extent exhibited to his creditors. By that paper, which was prepared from his books and under his supervision, or with his approval, there appears to be a surplus of assets over liabilities amounting to over \$48,000.

He should be prepared to shew wherein this is wrong, and to account for the great disparity between this shewing and that manifested a few months afterwards upon his assignment. In that statement there is put down \$18,000 worth of merchandize. I do not see that he has at all accounted for several thousand dollars worth of this stock. Having issued this statement, it is now his duty to make it appear in some satisfactory way that it is all wrong, if the fact be that it is wrong and misleading.

As to the authorities cited, I think *Crooks v. Stroud*, 10 P. R. 131, and *Lemon v. Lemon*, 6 P. R. 184, are cases one of which goes to an extreme, while the latter is not so explicit as other authorities. In the former case the Chief Justice thought that answers, to be satisfactory, must not only be so in form but in substance, *i. e.*, the account given of the property must shew the transactions respecting the same to be satisfactory, and not merely full and truthful. But this is opposed to the holding of the Court in *Hobbs v. Scott*, 23 U. C. R. 619, where Draper, C. J., said: "In one sense answers are unsatisfactory when they do not account for the application of the debtor's assets in a proper manner, but I do not interpret the word in that sense." Again in *Lemon v. Lemon* it is said, that to render the answer of the person examined "unsatisfactory," he must either have contumaciously refused to answer or so equivocated as to render his answers in reality no answers at all. But there is another class of answers which have to be considered in reference to this examination, and that are very clearly pointed out in *Ex parte Bradbury*, 14 C. B. 15, which is better and more fully reported in 2 Common Law Reports, 585. In that case it is said by Mr. Justice Williams: "Answers cannot but be unsatisfactory when the (person examined) declares his ignorance or obliviousness of a transaction of which it is manifest he cannot be ignorant or oblivious." Jervis, C. J., says: "We cannot say that the commissioner ought to have been satisfied with the answers of a person who, when asked why he drew a cheque in a certain name, and what he did with it,

says that he knows nothing at all about it. He is asked over and over again, and gives no other answer than that he cannot recollect. He gives no satisfactory reason for not recollecting; he states nothing upon which the commissioner could follow up the investigation. Every inquiry is stopped by the answer that he knows nothing and can recollect nothing. We cannot but consider that 'unsatisfactory.'

The examination in that case was on the 2nd of November, touching a transaction which happened on the 27th June preceding. The interval here was much less than that.

The same rule was followed in *Ex parte Lord*, 16 M. & W. 462, and *Re Caulfield*, 5 Ir. L. R. 358, wherein it was stated that if the person examined swears to statements of such a nature that no reasonable man could believe them or him, then he should be committed.

The case of *Ex parte Moir*, 21 Ch. D. 61, though like *Re Bradbury*, decided with reference to the bankrupt law, supplies principles of decision which are applicable to the present proceedings. The bankrupt there had kept no books and had sworn that he could not furnish any other cash account than what appeared in his banker's pass-book, but the Court ordered him to furnish a cash account of his receipts and payments for ten years before his bankruptcy. The Court said, (Jessel, M. R.,) that he could apply to other people who could give him, and would not be unwilling to give him, the information needed for this purpose. Much that is there pungently said is pertinent to the conduct of the present defendant, but I do not pause to quote it.

As to the stock in his last business, this defendant tells us that no stock book was kept, but he says the stock can be traced by other means. It is for him to qualify himself to do this, and also to explain his cheque and other financial transactions, if he wishes to get credit for answering satisfactorily.

Owing to the way in which the case was presented, I have found it needful to read through all the mass of depo-

sitions, but hereafter I take leave to say that a different practice should be followed. As the examination is now taken down by questions and answers, there is no difficulty in particularizing the answers that are complained of, and moving with reference to these as specified in the notice of motion. There is also a want of precision in some parts of the evidence as to what the facts are, as shewn in the books and accounts. The Judge can only look at what is proved or admitted in the examination, and care should be taken that there is no uncertainty as to the dates and amounts in question.

As at present advised, I think I should hold my hand in order that the defendant may have opportunity to clear up and put right what appears to be wrong, doubtful, or suspicious by reference to books, papers, and persons, and such other sources of information as will enable him to speak on the many details of which he now professes ignorance or inability to speak. The plaintiff and the assignee should facilitate reference to all the books and vouchers belonging to the estate. The defendant is to attend at his own expense to be further examined, and is to pay the costs of this application.

MCLEAN V. BRUCE.

Examination—Proof of service of appointment and payment of conduct money—Examiner's certificate—Waiver.

Upon a motion by the defendant to compel the plaintiff to attend again for examination, after his refusal to be sworn upon an appointment for his cross-examination upon an affidavit filed on a pending motion, the only material filed was a certificate of the examiner, which did not shew that due service of subpoena and appointment and payment of conduct money had been made.

Seemle, the certificate of the examiner as to these points would not have been sufficient; and

Held, that, in the absence of evidence, it was not to be inferred from the fact that the plaintiff attended at the time and place appointed for his examination, that there was any right then to examine him; and the plaintiff did not by such attendance waive his right to have the service and payment proved.

[October 16, 1888.—*Boyd*, C.]

AN appeal by the plaintiff from an order of the Master in Chambers, directing the appellant to attend again for examination at his own expense and pay the costs thereof, because of his refusal to be sworn when he attended upon an appointment before a special examiner.

The appointment was for cross-examination upon an affidavit filed by the plaintiff upon a pending application for garnishment.

Previous to the appointment in question, another attempt had been made to cross-examine the plaintiff, and the Master in Chambers, holding that the plaintiff was on that occasion right in refusing to be sworn, made an order on the 10th September, 1888, that the defendant might be at liberty to examine the plaintiff upon payment of \$5 costs.

Pursuant to this order the appointment now in question was issued, and the plaintiff attended before the examiner at the time and place appointed, but refused to be sworn, on the ground that the defendant had no right to examine him, not raising any question as to service of appointment or payment of conduct money.

The examiner certified to what took place before him, but not as to the service or payment, and his certificate was the only material filed on the application by the

defendant to the Master to compel the plaintiff to attend again.

The Master made the order as asked by the defendant, and the plaintiff appealed.

The appeal was argued on the 15th October, 1888.

Hamilton Cassels, for the appeal.

F. C. Moffatt, contra.

Judgment was delivered on the following day.

BOYD, C.—There does not appear to be any sufficient evidence of service of subpœna and appointment and payment of conduct money to the plaintiff in order to warrant the order that he should attend to be examined at his own expense, and pay the costs of the application. The certificate of the special examiner does not cover any of these points, even if that was sufficient evidence: *Bolckow v. Foster*, 7 P. R. 388. The Master refers to the order of 10th September, but that is conditional that the defendant might be at liberty to examine the plaintiff on payment of \$5 costs; and there is no evidence of the payment being made. The coincidence of a person being present in the examiner's office, and an appointment for his examination having been made for that time and place, does not prove that there was any right then to examine, or that the refusal of the party to answer was any default which the Court can regard: *Waddle v. McGinty*, 2 Ch. Chamb. R. 442, and *The Queen v. Flavell*, 14 Q. B. D. at p. 366. I see no evidence of waiver.

The appeal is allowed, with costs to be set off against costs owing by the plaintiff to the defendant.

HALL V. GOWANLOCK.

Discovery—Libel—Privilege—Answers tending to criminate—Costs.

No man can be compelled to answer a question incriminating himself. And where the defendant upon his examination for discovery in an action of libel refused to answer questions as to the authorship of an alleged libel, and claimed privilege, not before the examiner, but afterwards upon a motion by the plaintiff to commit him for refusal to answer, swearing positively that the answers might tend to criminate him :

Held, that he was entitled to the privilege, and that it was not too late to claim it.

The costs of the motion to commit were made costs to the plaintiff in the cause.

[October 16, 1888.—*Boyd, C.*]

A MOTION by the plaintiff to commit the defendant for refusal to answer certain questions upon his examination for discovery before the trial.

The facts appear in the judgment.

The motion was argued in Chambers on the 15th October, 1888.

Kilmer, for the motion.

John Douglas, contra.

BOYD, C.—The specific complaint is, that questions 280, 281, and 282 have not been answered by the defendant. The action is against the defendant for writing and publishing alleged libellous matter in the *Parkdale Times*. The publication is in the shape of a letter with the defendant's name subscribed as signature thereto, and headed "Traitors to the town." Q. 280 is : Did you ever see any of this "Traitors to the town" before it was issued? A. I decline to answer that question, because I am not compelled to answer it; that is my signature there, but I might say that I didn't write that letter. Q. 281. Who wrote that letter "Traitors to the town?" A. I decline to answer that question. Q. 282. Why? A. Because I refuse to answer it.

The defendant now, on the motion to commit, produces an affidavit explaining that it was out of no disrespect to

the Court that he refused to answer, but under the belief that if he did answer, he might tend to criminate himself, and that he did not know what words to use to protect himself other than to refuse to answer. And he affirms in the last section of the affidavit, "I still believe that by answering said question, I might tend to criminate myself." It may be argued that, as he has already answered that he did not write the letter, it cannot criminate him to say who did write it; but this should not be weighed too nicely as against his oath now that the answering may tend to involve himself.

Personally I quite agree with Mr. Justice Cave in *Pankhurst v. Wighton*, 2 Times Law Reps. 745, who believed "the palladium of British justice would not suffer materially if a man who published an anonymous libel were compelled to answer the question whether he had done so or not." But, beyond this, I am bound as he was by the settled rules of law. As he held in that case: "The law of England said that no man could be compelled to answer a question incriminating himself." I am of the opinion that it is not too late now to raise the point, and seek protection from this discovery: *Lamb v. Munster*, 10 Q. B. D. 110, shews the length to which the Court will go in shielding the defendant in such cases as this. And as to the time, the *King of Two Sicilies v. Willcox*, 1 Sim. N. S., at p. 320, justifies the privilege being claimed as long as any thing remains to be disclosed.

The failure to claim privilege before the examiner has led to this application, and while I refuse to commit, I think the costs should be costs in the cause to the plaintiff.

MCLEOD v. SEXSMITH.

Judgment under Con. Rule 756—Stage of action when ordered—Admissions in letters.

An application for judgment under Con. Rule 756 cannot be made until the right of the party applying to the relief claimed has appeared from the pleadings.

And an order made under that rule, before the delivery of any pleading in the action, based on admissions in letters, was set aside.

[October 9, 1888.—*Armour, C. J.*]

AN appeal by the defendant from an order of the local Judge at Kingston, giving the plaintiff leave under Con. Rule 756 to sign judgment in an ordinary mortgage action for the relief claimed by the indorsement on the writ of summons. The order was made after appearance, but before any pleading had been delivered, and was based upon admissions contained in letters written after the commencement of the action by the defendant and his solicitor to the plaintiff's solicitor.

The appeal not being in time, the defendant at the same time moved for leave to appeal.

The appeal and motion were argued together on the 5th October, 1888.

C. J. Holman, for the defendant.

T. Langton, for the plaintiff.

Judgment was delivered on the 9th October, 1888.

ARMOUR, C. J.—I do not think that the application can be made under Rule 756 until the right of the party applying to the relief claimed has appeared from the pleadings. The order appealed from was therefore improperly made, and must be rescinded. The costs of the appeal and of the application will be costs in the cause to the defendant in any event.

ROWLAND V. BURWELL.

*Reference, scope of—Judgment of foreclosure—Pleadings—Con.
Rules 56, 57.*

A judgment directed that the Master should take the usual accounts for redemption or foreclosure of mortgaged premises and should also take the accounts in respect to certain other matters set out in the pleadings. Under this the defendant contended that the Master should take into account a certain sale by the plaintiff, as mortgagee, to a person who, it appeared, had not paid his purchase money. There was no specific mention of this sale in the pleadings or judgment.

Held, that the proposed inquiry was not within the scope of the pleadings or the judgment or of Con. Rules 56 and 57; and the questions which it would raise were questions which ought to have been raised by the pleadings and determined by the Court, and not delegated to the Master.

Bickford v. Grand Junction R. W. Co., 1 S. C. R. at p. 725; *McDougall v. Lindsay Paper Mill Co.*, 20 U. C. L. J. N. S. 133; *Wiley v. Ledyard*, *ib.* 142, referred to.

[October 3, 1888.—*Armour*, C.J.]

APPEAL by the defendant from a certificate by the local Master at London of his ruling in the course of a reference, that he had no power to enter into the question of the sale of the portion of the lands in question, sold by the plaintiff to one Ivey under the power of sale in a mortgage from the defendant to the plaintiff.

The plaintiff by his statement of claim shewed that he was a second mortgagee from the defendant of the lands in question in this action; that he had acquired the equity of redemption therein by purchase from one Allen, the vendee of the first mortgagee under the power of sale in the first mortgage, subject to another mortgage in favour of the London Loan Company created by Allen; that he had paid interest on the London Loan Company's mortgage; that default had been made upon his own mortgage; and he claimed possession of the lands, and in the alternative payment by the defendant of the amount due, including interest paid to the London Loan Company.

The statement of defence set up that the purchase by the plaintiff from Allen was not real and *bonâ fide*, but merely colourable; that the plaintiff had unlawfully cut

and removed timber from the lands; that the defendant was mortgagor in possession, and was willing that the plaintiff should have a reference to ascertain what was due him; and that the plaintiff should account for moneys received and securities assigned to him.

A consent judgment was issued referring to the Master at London to take the usual accounts, and make the usual inquiries for redemption or foreclosure, and directing that upon payment by the defendant of the amount found due to the plaintiff, the latter should assign and convey the mortgaged premises and other securities held by him.

The judgment also directed that the Master should consider and determine whether either party was entitled against the other to any sum in respect of the matters set out in the pleadings, and should award according to his finding; and that the Master should allow the plaintiff for payments made on any prior mortgage. The judgment further directed that on default of payment within six months from the report, the defendant should be foreclosed, and the plaintiff should have possession in default of payment within one month.

There was no mention in the pleadings or judgment of the sale by the plaintiff to Ivey; but the Master certified that it appeared from the evidence given before him that the mortgaged premises "had been disposed of at the instance of the plaintiff, as mortgagee under his mortgage in question in this action, to one Charles H. Ivey * * * who did not appear to have paid the purchase money, or any part thereof to the plaintiff, and the plaintiff does not therefore give credit to the defendant in his account for the amount of such purchase money as the defendant contends he should have done."

The Master also certified that he refused to take the sale to Ivey into account, on the ground that it was not one of the matters or transactions set out in the pleadings, or directed to be inquired into by the order.

The defendant's appeal from this certificate was argued before Armour, C. J., in Court, on the 2nd October, 1888.

R. M. Meredith, for the appeal.

E. R. Cameron, contra.

Judgment was delivered on the 3rd October, 1888.

ARMOUR, C. J.—I am of opinion that the ruling of the Master was right, and that the appeal must be dismissed, with costs.

It is manifest from the pleadings and the consent decree that the inquiry the Master was urged to make was not within their scope.

Nor was it, in my opinion, within the scope of Con. Rules 56 and 57 (219 and 220 of the Chancery General Orders).

The questions which this inquiry would raise—whether the plaintiff was liable to credit the defendant with the amount at which the land was knocked down, or with any part of it, and whether he was liable for wilful neglect and default by reason of his not procuring the purchaser to sign the contract of purchase, and if so, to what amount—were questions beyond the scope of the pleadings and decree, and of Con. Rules 56 and 57, and questions which ought to have been raised by the pleadings, and determined by the Court, and were not fit questions for the determination of the Master, or questions that ought to have been delegated to him for his decision.

I refer to *Bickford v. Grand Junction R. W. Co.*, 1 S. C. R. at p. 725; *McDougall v. Lindsay Paper Mill Co.*, 20 U. C. L. J. N. S. 133; *Wiley v. Ledyard*, *ib.* 142.

SCOTT V. DALY.

Costs—Party and party—Status of solicitor.

The defendant in this action was represented by a firm, purporting to be a firm of solicitors, one of the members, however, not being a duly admitted or certificated solicitor. The plaintiff objected to the costs awarded the defendant in the action being taxed to him.

Held, that in the absence of proof that these costs had not been paid by the defendant to the persons who acted as his solicitors, the objection could not prevail; nor could it even if that proof had been given.

Reeder v. Bloom, 3 Bing. 9; ——— v. *Sexton*, 1 Dowl. 180, followed.

[October 26, 1888. —*Armour*, C.J.]

IN this case judgment was given dismissing the action with costs.

Upon the taxation of the defendant's costs the plaintiff objected to any costs being taxed to the defendant on the following facts as set out in the affidavit of one Cameron, one of the solicitors for the plaintiff:

"That all papers in said three actions by this action consolidated, and in this action, and the pleadings and proceedings had and taken therein on behalf of the defendant, were indorsed with, and were had in the name of, and issued by, either Messrs. Keefer, Keefer, & Thacker, or Messrs. Keefer & Thacker; that the said firm of Keefer, Keefer, & Thacker, which has been dissolved a considerable time ago, was advertized in the public press and on the letter heading of that firm as being composed of Thomas A. Keefer, Frank H. Keefer, and John Thacker, and the firm of Keefer & Thacker as being composed of Frank H. Keefer and John Thacker; that the said Frank H. Keefer has never been admitted a solicitor of the Superior Courts of Ontario, and he is not entitled to practise therein, either in his own name or any other; that the business of the said two firms was conducted for the benefit of the said Frank H. Keefer; that the letter hereto attached marked A. is a letter received by my said firm in this matter from the said Keefer & Thacker;" and "that the notice hereto attached marked B. is the advertise-

ment of the said firm of Keefer & Thacker, as published in the *Daily Sentinel*, from which the said notice is taken."

The letter referred to had a printed heading, and the advertisement was similar to it: "Keefer & Thacker, barristers, solicitors, notaries, conveyancers, &c. Frank H. Keefer. John Thacker."

The taxing officer, nevertheless, taxed the costs to the defendant, and the plaintiff appealed from the taxation.

The appeal was argued before Armour, C. J., in Chambers, on the 23rd October, 1888.

D. W. Saunders, for the appeal.

Delamere, contra.

R. S. O. (1887) ch. 147, sec. 24; 22 Geo. II., ch. 46, sec. 11; *Dunne v. O'Reilly*, 11 C. P. 404; *Williamson v. Aylmer*, 12 P. R. 129; *Re Macdougall*, 13 O. R. 204; *Re Jackson and Wood*, 1 B. & C. 270; *Prebble v. Boghurst*, 1 R. and My. 744; *Coates v. Hawkyard*, *ib.* 746; *Sumner v. Ridgway*, *ib.* 748; *Pulling on Attorneys*, 318; *Lindley*, on Partnership, (Blackstone ed.) 164; *Marshall on Costs*, 237, were referred to.

ARMOUR, C. J.—It is not necessary for me to determine whether any or either of the solicitors has rendered himself liable to the penalties and punishments provided by the Act respecting solicitors: all I have to determine is whether the facts shewn by the affidavits had the effect of depriving the successful party in the action from recovering the costs against the unsuccessful one.

It is quite consistent with the facts shewn by the affidavits that all these costs have been paid by the successful party to the persons who acted as his solicitors, and if so, what ground is there for saying that he is not entitled to recover them from the unsuccessful party?

In the absence of proof that these costs have not been paid by the successful party to the persons who acted as his solicitors, the objection certainly cannot prevail, and

I am of opinion that it could not prevail even if that proof had been given.

Reeder v. Bloom, 3 Bing. 9; ——— v. *Seaton*, 1 Dowl. 180, are authorities against the objection, and *In re Jones*, L. R. 9 Eq. 63, and *In re Hope*, L. R. 7 Ch. App. 766, may also be referred to as bearing on the question.

The passing of the Imperial Act 37 & 38 Vic. ch. 68, sec. 12, is additional proof that this objection is untenable in this country, where the law on the subject is the same as it was in England before the passing of that Act. See *Fowler v. Monmouthshire Canal Co.*, 4 Q. B. D. 334.

The appeal must be dismissed with costs.

RE O'DONOHUE, A SOLICITOR.

Solicitor and client—Costs, taxation of—Disallowance of costs of unnecessary proceedings—Interest—Appeal—Time.

The mere non-communication by a solicitor to his client of an offer of settlement does not prove that proceedings after the offer were unnecessary, and that the costs of them should be disallowed under Con. Rule 215, unless it is shewn that the offer was an advantageous one, the acceptance of which the solicitor ought to have advised, and it can be fairly inferred that he refrained from communicating it and advising its acceptance merely for the purpose of putting costs into his own pocket, and without regard to the interests of his client.

A taxing officer has no authority to charge a solicitor with interest upon moneys in his hands belonging to his client.

The time for appealing from a taxation of costs begins to run from the date of the certificate of taxation, not from the date of each ruling in the course of taxation.

[October 24, 1888.—*Armour*, C. J.]

AN appeal by the solicitor from the certificate of J. H. Thom, taxing officer, of the result of the taxation of a bill of costs and an accounting by the solicitor for moneys received by him on account of a client, under an order of reference obtained by the client.

The appeal came on for argument in Chambers on the 12th October, 1888.

W. H. P. Clement, for the client, raised the preliminary objection that the appeal was too late, inasmuch as the taxation and accounting had extended over a period of several months, and although the appeal was in time with reference to the date of the certificate, yet it was too late as regarded the dates of the several rulings which were the subject of appeal; citing *Stark v. Fisher*, 11 P. R. 235; *Quay v. Quay*, *ib.* 258; and *Ireland v. Pitcher*, *ib.* 403.

Aylesworth, for the solicitor, contended that the date of the certificate, and not the dates of the rulings made in the course of the taxation, was to be regarded.

The appeal was then argued subject to the objection.

The grounds are sufficiently stated in the judgment, which was delivered on the 24th October, 1888. Parts of the judgment relating to disputed matters of fact are omitted.

ARMOUR, C. J.—The solicitor having delivered to his client a bill of costs in a case of *Holmested v. Morphy*, in which the solicitor acted for the plaintiff, and in which the client was beneficially interested, the following order was issued on præcipe upon the application of the executors of the estate of the late Thomas Wilson, deceased: "It is ordered that the bill of fees, charges, and disbursements delivered by the above-named solicitor be referred to J. H. Thom, Esq., one of the taxing officers at Toronto, to be taxed, and that the said J. H. Thom do take an account of all sums of money received by the said solicitor for or on account of the applicant."

During the progress of the suit of *Holmested v. Morphy* the defendant Morphy offered the solicitor \$800 in full settlement of that suit, and of a suit of *Beatty v. Haldane*. This offer the solicitor communicated to the client, as also the fact that he had refused it. The solicitor was willing to advise the acceptance by the client of \$1,000, but answered the offer of the defendant Morphy by refusing the \$800, and offering to take \$1,200. The client did not reply

to the solicitor's communication of the fact that Morphy had offered \$800, and that he had refused it, and said he supposed the solicitor was acting wisely. Subsequently Morphy died, and after his death his representatives, as alleged, offered the solicitor \$1,000, which he refused. The solicitor denied that this offer was ever made. The taxing officer found that it was made, and inasmuch as the solicitor never communicated this latter offer to the client, he disallowed all the items in the bill of costs of *Holmsted v. Morphy* subsequent to this offer. Under Rule 1215 the costs of any proceedings that have been taken unnecessarily, and which were not calculated to advance the interests of the party on whose behalf the same were taken, should be disallowed by the taxing officer unless he is of opinion that such proceedings were taken by the solicitor because they were, in his judgment, reasonably exercised, conducive to the interests of his client. The evidence brought before me as the evidence upon which the taxing officer acted in disallowing these items did not, in my opinion, warrant him in the conclusion that the proceedings in respect of which these items were charged had been taken by the solicitor unnecessarily, and that they were not calculated to advance the interests of the client. They were necessary to be taken in order to bring the suit, which, it must be assumed, was commenced with the authority of the client, to a termination; and the fact that the client, subsequently to their having been taken, accepted \$800 in full of all his claims in that suit and in the suit of *Beatty v. Haldane*, as was shewn, did not of itself prove that these proceedings were not calculated to advance the interests of the client. The mere non-communication by the solicitor to the client of the offer of \$1,000 did not prove that these proceedings were unnecessary and were not calculated to advance the interests of the client, unless it were also shewn that this was an advantageous offer for the client to accept, and one the acceptance of which the solicitor ought to have advised, and it could be fairly inferred that he refrained from communicating it and advising its accep-

tance merely for the purpose of putting costs into his own pocket, and without any regard to the interests of his client: *Sill v. Thomas*, 8 C. & P. 762.

It may be that the evidence given in the office of the taxing officer was not all taken down in writing, and that consequently I have not all the evidence before me on which the taxing officer acted. I, therefore, remit this matter to him, in order that he may receive and take down in writing such evidence as may be offered on behalf of either party in respect thereof, with the direction that if upon the evidence already taken down in writing, and that may hereafter be taken down in writing, he shall find that the proceedings taken subsequent to the offer were unnecessary and not calculated to advance the interests of the client, within the views I have above expressed, and shall not be of opinion that such proceedings were taken by the solicitor because they were, in his judgment, reasonably exercised, conducive to the interests of the client, he shall disallow the costs of them; and if he shall not so find, or shall be of such opinion, he shall tax them to the solicitor.

* * * * *

The taxing officer had no authority to charge the solicitor with interest upon money in his hands belonging to the client. The Imperial Act 33 & 34 Vic ch. 28, sec. 17 gave that power to the taxing officers in England, but we have no such enactment in this country.

The question was not raised whether the disallowance of more than one-sixth of the bill in *Holmsted v. Morphy* entitled the taxing officer to impose the whole of the costs of the reference had before him upon the solicitor, nor whether, if less than one-sixth of that bill had been disallowed, he would have been entitled to impose the whole costs of such reference upon the client.

It was objected that this appeal from the certificate of the taxing officer was not taken in time, but I think it was: *Re Castle*, 36 Ch. D. 194. Had I been of a different opinion I would have enlarged the time for appeal.

The reference will therefore be remitted to the taxing officer to report in accordance with these directions.

[The solicitor appealed from this decision on one ground only, and his appeal was argued before the Common Pleas Divisional Court on the 29th November, 1888, and judgment was given on the 8th December, 1888, dismissing it with costs. The appeal was upon a question of fact, the remarks of ARMOUR, C. J., as to which are omitted from the above report.—REP.]

MACARA V. SNOW.

Counter-claim—Issue—Close of pleadings—Notice of trial.

A counter-claim must be a defence in the action in which it is pleaded, and it is as much a part of the defence as any of the other pleas. And therefore where the plaintiff took issue on the defence, not mentioning the counter-claim;

Held, that the pleadings were closed, and a notice of trial served thereafter was regular.

[October 26, 1888.—*The Master in Chambers.*]

A MOTION by the defendant to set aside a notice of trial given by the plaintiff because the cause was not at issue.

Masten, for the motion.

Douglas Armour, contra.

THE MASTER IN CHAMBERS.—The present rules seem to make no difference in the practice where a counter-claim is pleaded, which could affect the present motion.

It is objected that no issue has been delivered to the counter-claim,—but the plaintiff takes issue on the defence of the defendants, (not mentioning particularly the counter-claim) and the counter-claim is a part of that defence—as much so as any of the other pleas; and it therefore seems to me, that when the plaintiff takes issue upon the defence of the defendant, which must include in that term the *whole of the defence*, he takes issue on the counter-claim;

and *Hare v. Cawthrope*, 11 P. R. 353, establishes (I suppose) that the plaintiff may so answer a counter-claim and so put in issue its substantial truth in point of fact. That case is an answer to every part of this motion.

It is objected by Mr. Masten that a counter-claim is more than a defence, that it is, of itself, a substantial action. Granted. Then the plaintiff, by taking issue on it, has answered denying the existence of the claim of the defendant.

It is of much more importance here to point out that a counter-claim must be a defence in the action in which it is pleaded, or it cannot be good. Now here, as pointed out by Mr. Masten, the counter-claim is by the defendants as executors in right of an estate. The claim of the plaintiff is against the defendants in their personal capacity; and, therefore, I should think the counter-claim cannot be good, any more than a set-off would be under the same circumstances: *Rees v. Watts*, 11 Ex. 410; *Newell v. National Provincial Bank of England*, 1 C. P. D 496; they would both probably be bad for the same cause—that to allow them would be to alter the course of administration.

This latter point does not arise here, for there is no motion against the counter-claim; except that it emphasizes the fact that a counter-claim (be it what else it may) must first be a defence proper to the action in which it is pleaded. That is, it must be against the plaintiff in the same right in which the plaintiff is suing, and it must be a defence to the defendant in the same right as that in which the defendant is sued.

That is my notion at any rate.

Motion refused.

WORMAN v. BRADY.

Costs—Jurisdiction of County Court—Title to land—Pleading.

The statement of claim alleged that the defendant was a monthly tenant of the plaintiff's land, and that the plaintiff on a certain day terminated the tenancy by notice, and claimed damages for injuries to the demised premises. The statement of defence denied the allegation that the defendant was the tenant of the plaintiff.

Held, that the title was put in issue by such denial, and as a County Court would therefore have had no jurisdiction, the costs should be on the scale of the High Court, although the plaintiff recovered only \$75.

Held, also, that the question whether the title was in issue must be determined according to the pleadings, and not according to what took place on the trial or reference.

[November 2, 1888.—*Armour*, C. J.]

MOTION by the plaintiff for judgment on the report of an official referee assessing at \$75 the plaintiff's damages for injuries to premises demised to the defendant, and for costs.

The statement of claim alleged (paragraph 3) that the defendant became and was on a certain date a monthly tenant to the plaintiff, and (paragraph 4) that the plaintiff on a certain date terminated the tenancy by notice, and that great injury was done to the premises by the defendant.

The statement of defence, *inter alia*, denied the allegations in paragraph 3 of the statement of claim.

The motion was argued before ARMOUR, C. J., in Court on the 30th October, 1888.

The only question in dispute was as to costs.

D. C. Ross, for the plaintiff, contended that the title to land was brought in question by the pleadings, and therefore, though the amount of damages found was within the County Court jurisdiction, the action could not have been entertained by that Court; and the costs should, therefore, be on the scale of the High Court.

E. Taylour English, for the defendant, contra.

ARMOUR, C. J.—The title is clearly put in issue by the denial of all the allegations in the 3rd paragraph of the statement of claim.

Such denial is equivalent to the pleas *non demisit* and *non tenuit* before the Judicature Act, the former of which clearly put the title in issue, if indeed the latter did not do so too.

I must determine according to the pleadings, not according to what took place on the trial or reference: *Purser v. Bradburne*, 7 P. R. 18; *Coulson v. O'Connell*, 29 C. P. 341.

Judgment will be for the amount found due by the referee, with full costs of suit.

TENNANT & CO. V. MANHARD & CO.

Partnership—Judgment against firm—Execution against alleged partner—Con. Rules 756, 876.

The plaintiffs recovered judgment against the defendants, sued as a partnership firm, by default of appearance, after service of the writ of summons upon M., a member of the firm, and then moved under Con. Rule 876 for leave to issue execution upon such judgment against D., as a member of the firm, who had appeared. D. disputed his liability, but upon his cross-examination upon an affidavit filed on the motion, such facts appeared as convinced the Master in Chambers that he was a general partner, and he made the order asked for. The Master *Held*, that the admissions of D. in his cross-examination justified the order under Con. Rule 756, and avoided the necessity of sending an issue to be tried under Con. Rule 876. *Held*, also, that Con. Rule 756 was applicable at this stage of the cause, *i. e.*, after judgment obtained without pleadings.

[October 31, 1888.—*The Master in Chambers.*]

MOTION by the plaintiffs under Consolidated Rule 876, for leave to issue execution against one Doddridge as a member of the defendants' firm, against whom the plaintiffs had obtained judgment upon default of appearance, after service of the writ of summons upon Manhard, the other member of the firm.

Shepley, for the motion.

E. Taylour English, contra.

THE MASTER IN CHAMBERS.—It is new to me to see it attempted to apply Rule 756 to a proceeding after final judgment. But the application of it which Mr. Shepley has urged in this case seems to me to be sound. Manhard and Company are sued in this action in their partnership name, and Doddridge was served with the writ of summons as a partner. Doddridge appeared to the action with a memorandum on his appearance that he was not a general partner, but a limited partner, and a statement that he was not a proper person to be served for the partnership.

The plaintiffs recovered judgment without pleadings against the partnership, upon some other service than that upon Doddridge.

The plaintiffs have now moved for an execution against Doddridge, under Rule 876, as a member of the firm. Doddridge, before me, disputes his liability and contends by his counsel that I have no jurisdiction to grant leave for such an execution; that I can only, under such circumstances, send the question of his liability to be tried; that I cannot myself decide it.

The record at present stands as I have said,—an appearance by Doddridge and a memorandum such as I have mentioned, with a judgment for the plaintiffs against Manhard and Company.

Upon this motion Doddridge has made an affidavit, upon which the plaintiffs have examined him, and it is contended that upon that examination Doddridge is proved to be a general partner. It is shewn, I think clearly, by the examination, that there are mis-statements in the certificate of partnership. There was not, as therein stated, an advance of \$10,000 by Doddridge—the advance being chiefly of promissory notes for, at any rate, a large portion of the amount. I think under the 8th sec. of ch. 129 R. S. O. (1887) as to limited partnerships, that Mr. Doddridge is a general partner. This is clear under the decisions.

And Mr. Shepley contends that Rule 756 is then exactly applicable. For by its terms any party to an action, at any stage thereof, may apply to the Court or a Judge for such order as he may, upon any admissions of fact in the examination of any other party, be entitled to.

Now suppose upon an issue directed, that Doddridge's examination, and the matters of fact appearing on it, had been replied to his denial that he was a general partner that would have been a conclusive answer. Then, as at the present stage of the cause the necessary facts appear by the records of the Court, upon his examination, to render Doddridge liable to execution, the case seems to be within the words and the spirit of Rule 756, and the necessity of sending an issue to be tried is avoided by the defendant's own admissions. Upon consideration, this seems to me the natural meaning without any straining of the language.

Rule 385 of the old Rules, as to the entry on the record of the death, marriage, etc., of parties, or any change of interest, has been held to apply to entries after judgment, though the words of the Rule do not seem to point to an amendment at that stage so clearly as Rule 756.

I must make the order as asked.

TORONTO AND HAMILTON NAVIGATION CO. v. SILCOX.

Jury notice—Action to rescind contract—R. S. O. ch. 44, sec. 77.—Parties—Joint contractors.

The action was brought to rescind a contract for the sale of a vessel by the plaintiffs to the defendant, on the ground that the defendant had failed to perform his part of the contract, and for damages for breach of the contract and for injuries to the vessel, which had been delivered to the defendant, and to restrain the defendant from dealing with it, and for delivery up thereof.

Held, that this was an action over the subject of which, before the Administration of Justice Act, 1873, the Court of Chancery had exclusive jurisdiction, and a jury notice was therefore improper, under sec. 77 of the Judicature Act, R. S. O. ch. 44.

The defendant applied to add as a co-defendant one W., on whose behalf, as well as his own, the defendant had made the contract in question, and who with knowledge of it had ratified and adopted it, but who was not formally a party to it.

Held, following *Kendall v. Hamilton*, 4 App. Cas. at p. 513 *et seq.*, that the defendant had no right to force W. upon the plaintiff as a defendant, in the character of a joint contractor.

Quere, whether W. would have a right to be brought in as a defendant on his own motion.

[November 1, 1888. — *The Master in Chambers.*]

[November 10, 1888. — *Galt, C. J.*]

THE statement of claim in this action alleged an agreement between the plaintiffs and defendant for the purchase of a steamship by the defendant from the plaintiffs, and a transfer and delivery of the same to the defendant, but that the defendant neglected to perform his part of the agreement, and still retained possession of the vessel; it also alleged that the vessel had been damaged by reason of the defendant's neglect and improper care; that the plaintiffs, before action, gave the defendant notice that unless the agreement was performed by him, they would rescind it; and prayed that the agreement be rescinded and cancelled, and the defendant ordered to pay damages for the breach thereof, and for the injuries to the vessel; and that the defendant be restrained from dealing with the vessel; and for delivery up thereof.

The statement of defence alleged default in the plaintiffs in not making a proper transfer of the steamship and in not carrying out the agreement in other respects; that the defendant was induced by false representations to enter

into the agreement; that the defendant had frequently told the plaintiffs that they could have the vessel whenever they wanted it; and asked that the defendant might be relieved from the agreement and all liability thereon, upon the ground of false and fraudulent misrepresentations.

The plaintiffs joined issue upon the defence, and the defendant having filed and served a jury notice, the plaintiffs moved to strike it out, upon the ground that the cause was one over the subject of which, before the Administration of Justice Act, 1873, the Court of Chancery had exclusive jurisdiction: the Judicature Act, R. S. O. (1887) ch. 44, sec. 77.

The defendant also moved for leave to add one Weddell as a party defendant, under the circumstances appearing in the judgment.

Both motions were argued before the Master in Chambers on the 31st October, 1888.

Hoyles, for the defendant.

Skepley, for the plaintiffs.

THE MASTER IN CHAMBERS.—There are two matters here; one as to the jury notice, which the plaintiffs seek to set aside. I think this case is within clause 77 of the Judicature Act, and also that all the points in the case are far more fit to be decided by a Judge than by a jury. It is, at the present juncture of circumstances, one of the advantages of a trial by a Judge that the case can be decided some ten weeks earlier than if tried by a jury.

I think that is a legitimate consideration here, for the continuance of the present state of things must turn out very injuriously to one or both of the parties.

As to the right of the defendant to have added Weddell as a party defendant, there is no doubt as to the general rule, that a joint contractor sued, has the right to have his co-contractor joined with him as a defendant. There is a case of *Pilley v. Robinson* to this effect in 20 Q. B. D. 155; see also the judgment of Lord Bramwell in *Scarf v. Jardine*, 7 App. Cas. at p. 364.

But this case seems to be an exception from the general rule on this point. The contract was made between the company and Silcox, the present defendant. The latter now says that Weddell was a joint party with him, though not formally a party to the contract; or rather he says, what is a good deal different from that, that he made the agreement on behalf of himself and Weddell, who, after knowing the said agreement, ratified and adopted the same. But however that may be, *Kendall v. Hamilton*, 4 App. Cas. at pages 513 *et seq.*, is cited, and the judgment of Earl Cairns there treats of this very case, of one person entering into a contract in his own name merely, for himself and as agent for others, and holds that the party on the other side of such a contract has the absolute right in suing on it, to treat the contracting party as the sole party, notwithstanding the fact that there was another party behind jointly interested with the party who made the contract.

It is important in these motions to add or strike out parties, to consider who it is that makes the application. Here the plaintiffs do not seek to add Weddell: the plaintiffs would have a right to do so, but they object to its being done; they are content with their remedy against Silcox. Possibly Weddell might have a right to be brought in as defendant, but this is doubtful, and Weddell is not moving. Then *Kendall v. Hamilton* shows that the defendant has no right to force Weddell on the plaintiffs as a defendant, as a joint contractor with the defendant, under the circumstances that the defendant himself discloses.

So I must refuse this motion to add Weddell.

The defendant appealed from this decision both as to the jury notice and as to the addition of Weddell as a party.

The appeal was argued in Chambers on 10th November, 1888, by the same counsel who appeared before the Master.

GALT, C. J., dismissed the appeal, with costs to the plaintiffs in any event.

KEAN V. EDWARDS.

Award—Appeal from—Time—Trinity Term.

An award must be moved against within the term following its publication, or within the period which such term formerly occupied.

And when the term has been abolished, where an award was published on the 13th August, 1888, notice of appeal dated 7th September, 1888, but not served till 10th September, 1888, was
Held, too late, and the appeal was dismissed.

[November 13, 1888.—*Armour*, C. J.]

APPEAL by the defendant from an award made and published on the 13th August, 1888.

Notice of appeal dated 7th September, 1888, was served on the 10th September, returnable on the 14th September.

What would formerly have been Trinity Term ended on the 8th September.

The appeal was several times enlarged, and finally came on for hearing on the 2nd November, 1888, before ARMOUR, C. J., in Court, when

Lash, Q. C., and *Kean*, for the plaintiff, objected that the appeal was too late, notice not having been served within the next term after the publication of the award, citing R. S. O. (1877) ch. 39, sec. 11; R. S. O. (1887) ch. 44, sec. 56; *Re Moyle and Kingston*, 43 U. C. R. 307; *Pardee v. Lloyd*, 5 A. R. 1; *Smith v. Parkside Mining Co.*, 6 Q. B. D. 67.

Pepler, in answer to the objection, submitted: (1) that enlargements of the appeal waived the objection; (2) that as Long Vacation does not now end till the 1st September, Trinity Term does not now begin till the first Monday in September; and (3) that the notice of motion being dated on the 7th September, the initiation of the complaint was in time; and he also asked to have the time extended. He referred to *Re Midland R. W. Co. and Heming*, 4 D. & L. 788; *Re Wheeler and Murphy*, 2 P. R. 32; *Sherry v. Oke*, 3 Dowl. 349; *Pardee v. Lloyd*, 26 Gr. 374.

Judgment was delivered on the 13th November, 1888.

ARMOUR, C. J.—The objection that the motion to set aside the award herein was not made in time, must prevail, and the motion must be dismissed with costs; but, as the objection might and should have been taken on the return of the motion, only such costs will be taxed as were incurred up to the return of the motion.

WHITE V. RAMSAY.

*Action for recovery of land—Joinder of other causes of action—Con.
Rule 341.*

The plaintiff, without leave, joined other causes of action in an action for the recovery of land, contrary to Con. Rule 341.

Upon a motion by the defendant to set aside the writ of summons, the Master in Chambers made an order for the amendment of the writ by striking out the portion of the indorsement containing the other claims, upon payment of costs.

ROBERTSON, J., on appeal, upheld the Master's order.

[October 10, 1888.—*Robertson, J.*]

THIS was an appeal by the defendant from an order made by the Master in Chambers, bearing date 3rd September, 1888, allowing the plaintiff to amend his writ of summons by striking out the claim for damages for conversion of goods, &c., and the claim for damages for assault, from the indorsement of claim thereon.

The writ was indorsed as follows: The plaintiff's claim is to recover possession of the south-west quarter of lot 26, concession one, in the township of Oro, in the county of Simcoe; and for mesne profits, and for an account of rents, and for damages \$500 for the conversion by the defendant of the goods and chattels of the plaintiff; and for damages for assault \$500.

The order appealed from was made upon the return of a motion by the defendant to set aside the writ of summons, upon the ground that the plaintiff had, contrary to Con. Rule 341, joined in one action a claim for the recovery of land and other claims, without leave.

Hoyles, for the defendant (appellant.)

C. J. Holman, contra.

The following authorities were referred to besides those mentioned in the judgment; *Weller v. Proctor*, 11 P. R. 323; *White v. Galbraith*, 12 P. R. 513; *Arch. Practice*, 14th ed., vol. ii., p. 1207.

ROBERTSON, J.—On general principles, I cannot see why this amendment should not be allowed. Rules 10 and 474, O. J. A., (now consolidated in Rule 444) allow the Court, or a Judge at any time, on such terms as may seem just, to *amend any defect or error in any proceedings, &c.* The amendment was, therefore, justified under the foregoing, and the Master ordered it on payment of \$8 costs to the defendant's solicitor.

Mr. Hoyles cited *In re Pilcher*, *Pilcher v. Hinds*, 11 Ch. D. 905; but that is not an authority. There the plaintiff, after having improperly misjoined several causes of action with the one for the recovery of land, and after the service of the writ, and after an appearance entered by the defendant, took out a summons "to continue the action in its present form,"—in other words, after having committed the irregularity, he came to the Judge and asked for leave to perpetuate that irregularity, or to be granted what he had himself done without leave, contrary to the rules of practice. The Judge, and afterwards on appeal, the Court (Jessel, M. R., James and Brett, L.JJ.,) held that he was too late—that is, too late to ask for leave to join the several causes in the one action.

In *McIlhargey v. McGinnis*, 9 P. R. 157, Wilson, C. J., struck out an amendment in a statement of claim in an

action for the recovery of land after statement of defence delivered, by which the plaintiff sought and prayed for a foreclosure as mortgagee, holding that the plaintiff should have applied before action for leave, &c., and not have waited until he discovered that it was desirable in the alternative to have the right to foreclose, after the defendant set up and prayed that a certain lease might be declared a mortgage, and that they, the defendants, might be allowed to redeem the plaintiff at the expiration of five years from the date of lease. And in his judgment he refers to *In re Pilcher* as an authority for so holding, and in my judgment rightly too, for this reason, that the plaintiff was by his amendment trying to do what he could only do after having obtained leave in the first instance, &c.; so that neither of these cases supports the appellant's contention.

Mulkern v. Doerks, 51 L. T. N. S. 429, was an action to recover lands, with which the plaintiff improperly joined other causes without leave. The defendant appeared and took out a summons to strike out the claim for possession of the land, or in the alternative, the other claims, on the ground that leave had not been given, &c. The Master refused the application and gave plaintiff leave to join them; and on appeal, Denman, J., affirmed the decision. The defendant appealed, and the Court (Huddleston, B., and Hawkins, J.,) dismissed the appeal, on the ground that the defendant had taken a fresh step by entering an appearance; so that it is a mere irregularity.

In *Wilmott v. Freehold Co.*, 51 L. T. N. S. 552, the plaintiff joined several causes of action in an action to recover land without leave; and the defendant set up the irregularity by way of defence, and on an application to strike out that part of the defence, Bacon, V. C., dismissed the application with costs; the plaintiff appealed, and the appeal was dismissed; but Baggallay, L. J., said: "I think this is a case in which the plaintiff ought to have leave to amend, subject to the payment of costs." So that, had this been an application like the one before the Master to set aside the writ of summons, I think

the Court would have allowed the plaintiff to amend by striking out the objectionable claims on payment of costs.

Mr. Holman cites, among other cases, *Musgrave v. Stevens*, W. N. 1881, p. 163. There, the application was after the writ had issued claiming an injunction to restrain from removing hay, straw, &c., and after service on the defendants and one of them had appeared, and after the plaintiff had obtained an interim injunction, which had been extended to the trial, and was for leave to amend the writ by adding a claim to recover possession of his farm for breaches of covenant contained in the lease; but Chitty, J., refused, considering himself bound by *In re Pilcher*, and afterwards on appeal, before Jessel, M. R., Baggallay and Lush, L.JJ., the appeal was disallowed, but the Master of the Rolls said, that, although the application was made under Order XVII., Rule 2, which is general as to amendments, and was wide enough, yet "the plaintiff must make a very special cause for amendment after service of the writ. In the present case no special case had been made, and there was no reason why the plaintiff should not commence a separate action." And Mr. Holman argued therefrom, that on making out a special case, leave would be given to amend as prayed. This does not support the defendant's contention, because there the plaintiff was asking leave to amend by adding the cause of action, whereas in the case before me, the leave is asked to amend by striking out the causes of action improperly joined.

On the whole case, and in view of the rules as regards amendment, I cannot see why the plaintiff should not be allowed to do what the Master has ordered. Supposing, for argument sake, that after he had issued the writ, he had applied to amend by striking out the objectionable claims? I take it that the Court or a Judge would have permitted the amendment on an *ex parte* application. What difference then is there in allowing it, when the defendant makes an application to set aside the writ? In my judgment, it is within the province of the Master to allow the amendment "on such terms as to costs or otherwise as to him may

seem just;" and I do not see the justice of involving the plaintiff in the extra expense of commencing a new action, which would be the effect of granting the defendant's motion.

The cases cited by Mr. Hoyles, in my judgment, are all distinguishable from the one now under consideration, and are not therefore authority in favour of the defendant's contention.

I am, therefore, of opinion that the appeal should be dismissed with costs.

COLTER v. MCPHERSON.

Discovery—Malicious prosecution—Investigation of transactions between the plaintiff and a third person.

In an action for damages for falsely and maliciously and without reasonable and probable cause preferring a charge of perjury, and also a charge of obtaining a valuable security by false pretences, the defence averred that the plaintiff and one J. conspired together to obtain two promissory notes from the defendant by false pretences; that the plaintiff first visited the defendant, and by fraud and falsehood induced him to enter into a contract to purchase certain hayforks, and that J. followed him in course of time, in pursuance of their fraudulent scheme, and by fraud and falsehood and false pretences obtained the notes.

Held, that upon examination of the plaintiff for discovery the defendant should be permitted to inquire into the dealings between the plaintiff and J., fully and freely to ascertain whether J. and the plaintiff were acting in concert, and whether any false pretence made by J. was in fact a false pretence by the plaintiff, and for this purpose might investigate all sales of forks made by the plaintiff or J., or either of them, under any agreement or arrangement, and the history of all notes received in carrying out such sales, and of all entries in the plaintiff's bill books, and all other books relating to such transactions.

[September 21, 1888.—*Rose, J.*]

A motion was made at the 1888 Spring Sittings for trials at Brantford, before the presiding Judge as a Judge in Chambers, to obtain an order reversing an order of the Master in Chambers dismissing the action with costs, on the ground of the plaintiff's refusal to answer certain questions

on his examination for discovery. An order was also asked to reinstate the action, and place it on the cause list for trial.

As it appeared that the refusal was *bonâ fide*, on the advice of counsel, Rose, J., the presiding Judge, was of opinion that the order should be reversed, and the action placed upon the cause list for trial at that sittings, being the position of the cause when the order was made, but reserved the question whether the plaintiff was bound to answer the questions so put to him.

Osler, Q. C., for the plaintiff.

Ermatinger, Q. C., for the defendant.

Judgment was subsequently delivered, 21st September, 1888, as follows :

ROSE, J.—The statement of claim sets out two causes of action, viz. :

1. " Falsely and maliciously and without reasonable and probable cause," preferring a charge of forgery.

2. Falsely, &c., preferring a charge of obtaining a valuable security by false pretences.

The statement of defence, among other things, avers that the plaintiff and one Jones conspired together to obtain two promissory notes from the defendant by false pretences ; that the plaintiff first visited the defendant, and by fraud and falsehood induced him to enter into a contract to purchase certain hay forks, and that Jones followed him in course of time, in pursuance of their fraudulent scheme, and by fraud, falsehood, and false pretences, obtained the notes.

The pleadings shew that the plaintiff was acquitted of both charges.

Upon examination for discovery the plaintiff, under advice of counsel, refused to exhibit any entries in his bill book relating to any notes received from Jones for the sale of forks, except the notes obtained from the defendant, or to

answer any questions as to his dealings in connection with Jones in selling hay forks to other persons than the defendant.

The plaintiff, of course, cannot be relieved from answering the questions on the ground of subjecting himself to criminal prosecution, for he has already been tried and acquitted.

It is of the utmost consequence to the defendant to be able to establish that the plaintiff and Jones were working in concert, and that in fact each was the agent of the other in making the representations complained of.

If the evidence will sustain the charge of the notes having been obtained by a false pretence, and it is shewn that Jones made the false pretence at the instance of and in privity with the plaintiff, so that the plaintiff might obtain the notes, and if the plaintiff did obtain the notes, as is alleged, it is clear that the false pretence made by Jones was, in law, a false pretence made by the plaintiff; and the plaintiff might well have been convicted of obtaining the notes by a false pretence: see *Regina v. Butcher*, 8 Cox C. C. 77, and *Regina v. Kerrigan*, 9 Cox C. C. 441.

The defendant should, in my opinion, be permitted to enquire into the dealings between the plaintiff and Jones fully and freely, to ascertain whether Jones and the plaintiff were acting in concert, and whether any false pretence made by Jones was in fact a false pretence by the plaintiff. And for this purpose, I think, he may investigate all sales of forks made by them, or either of them, under any agreement or arrangement between them, and the history of all notes received in carrying out such sales, and have discovery of the entries in the plaintiff's bill books and all other books relating to such transactions.

The investigation of transactions with others than the defendant may throw much light on the transaction with the defendant and shew whether or not the whole scheme (if any) was or was not bottomed in fraud.

Although the plaintiff has been acquitted, the defendant must have an opportunity to shew reasonable and probable

cause, if such existed, and, if he can, the truth of the charge.

I have not examined the statement of defence critically to discover whether it sufficiently avers any false pretence; for it may be that, if there has been fraud, the evidence will be stronger than the pleading.

And if, while technically there has been neither forgery nor false pretence, there has been fraud, I think, in the interests of justice, there should be a full investigation of the plaintiff's conduct, so that the jury may know what manner of person he is who comes before them asking for damages.

If he be an honest, fair dealing man, I am doing him no injury in giving him an opportunity of explaining what may appear equivocal, and if the defendant has been defrauded, I should afford him every opportunity of defending himself against a claim for damages by the person who has defrauded him.

The plaintiff must attend to be further examined at his own expense, and failing so to do, the action must be dismissed with costs.

There will be no costs of this motion, as the defendant has been unsuccessful in sustaining the order of the learned Master.

BETTS v. GRAND TRUNK R. W. Co.

Discovery—Production of documents—Railway accident—Report and evidence on investigation.

[November 13, 1888.—*The Court of Appeal.*]

AN appeal by the defendants from the order of the Common Pleas Divisional Court, 12 P. R. 86, was argued before the Court of Appeal on the 21st May, 1888.

Osler, Q. C., for the appellants.

Robinson, Q. C., and *Shepley*, for the respondent.

On the 13th November, 1888, the Court delivered judgment dismissing the appeal and affirming the judgment of the Court below, substantially on the same grounds.

OSLER, J. A., referred to *Woolley v. North London R.W. Co.*, L. R. 4 C. P. 602; *Lyell v. Kennedy*, 27 Ch. D. 1, especially remarks at pp. 18, 19, and 31; and *Kyshe v. Holt*, W. N. 1888, p. 128, in addition to the cases cited in the judgment appealed from.

RE SMART, INFANTS.

Infants—Custody—Habeas corpus—Petition—Amendment—Con. Rule 444—Appeal—Waiver.

The order of the Chancery Divisional Court, 12 P. R. 435, affirmed on appeal.

Held, that the infants' father had waived his right to appeal from the order directing the filing of a petition by having complied with such order.

Semble, but for the waiver, the appeal of the father must have succeeded; for the power given by Rule 474, Ontario Judicature Act, (Con. Rule 444), is to amend any defects or errors, not to compel a litigant to adopt a different form of remedy for one which is in itself competent and regular.

[November 13, 1888.—*The Court of Appeal.*]

APPEAL by the mother of the infants from the order of the Chancery Divisional Court, 12 P. R. 435, in so far as it varied the order of Ferguson, J., 12 P. R. 312, by directing that the *habeas corpus* should run concurrently with the petition, and be disposed of with it.

Cross-appeal by the father of the infants from the order of the Divisional Court, so far as it affirmed the order of Ferguson, J., directing the filing of the petition.

The appeal and cross-appeal were argued together on the 22nd September, 1888, before Hagarty, C.J.O., Burton, Patterson, and Osler, JJ.A.

S. H. Blake, Q.C., and *H. Cassels*, for the mother.

J. Maclellan, Q.C., and *J. K. Kerr*, Q.C., for the father.

On the 13th November, 1888, the judgment of the Court was delivered by

OSLER, J.A.—A writ of *habeas corpus* was issued on the application of David Smart, the father of the three infant children above named, directed to their mother, Emily Ardelia Smart, commanding her to produce them, together with the day and cause of their detention, before the presiding Judge in Chambers of the Chancery Division, on Friday, the 25th June, 1886.

In September, 1886, a return was made to the writ setting forth certain agreements between the husband and wife, under which the custody of the children had been committed to the latter, and their care, maintenance, and education assumed by her; and further alleging that the husband by reason of his habits of life, &c., was an unfit and improper person to be entrusted with the custody of the children, who would suffer both in their persons and estates if they were transferred to him.

Several circumstances were set forth in the return in support of the latter allegation.

There would appear to have been a demurrer to or a motion against the return, as we find in the appeal book an order made on the 8th November, 1886, in Chambers, adjudging and declaring the return to be sufficient and good in law, and ordering that the truth of the matters alleged therein should be tried upon *viva voce* evidence at the time and place thereafter appointed, pursuant to the usual practice for the trial of actions.*

The matter afterwards came on for trial before Mr. Justice Ferguson, on a day fixed by him for the purpose.

After it had been partially heard, the learned Judge expressed the opinion that the matters in question could be more conveniently dealt with and disposed of upon a petition for the custody of the infants, and the following order was thereupon made:†

(2) This Court doth order that the matters in dispute herein be brought before the Court by way of petition by the applicant herein, and that no further proceedings be taken under the writ of *habeas corpus*.

(3) And this Court doth further order that the costs of this matter, other than those already disposed of, be reserved to be disposed of with the costs of the said petition, if one be presented, and if no such petition be presented, the said costs are hereby reserved to be disposed of upon application of either party.

* See 11 P. R. 482.

† See 12 P. R. 312.

(4) And this Court doth further order that in the event of such petition being presented, the respondent be at liberty to file a formal answer thereto, and the petitioner to file a reply thereto.

(5) And this Court doth further order that the evidence, examinations, and other proceedings taken herein be used and admitted, so far as they are evidence, as evidence upon the said petition and as if taken thereunder.

(6) And this Court doth further order that in the event of the said petition being filed, no objection shall be taken to the jurisdiction by the respondent, Emilie Ardelia Smart, on the ground that the said infants are not wards of this Court.

(7) And this Court doth further order that the proceedings herein under the writ of *habeas corpus* are to continue and to be considered pending until ten days after the presentation of the said petition, or this Court make further order.

The applicant for the writ of *habeas corpus* appealed from this order to a Divisional Court of the Chancery Division on several grounds, and that Court varied the order by directing that the writ should remain in force, and that the questions for trial under the return thereto should be tried at the same time and place as the questions under the petition.*

From this judgment the present appeal is brought; the appellant, Mrs. Smart, contending that the learned trial Judge had an absolute discretion to decide as to the manner in which the matters in dispute should be investigated before him, and that his order, therefore, should not have been interfered with, and that the effect of the order of the Divisional Court was to complicate and embarrass the trial.

The order of the learned Judge at the trial was said on the argument to have been made in pursuance of Rule 474, O. J. A. (Consol. Rule 444), but, we think, goes far beyond anything which that Rule or Rule 155 authorizes.

*See 12 P. R. 435.

It was not an amendment of the respondent's proceeding, but the compulsory substitution therefor of one of a wholly different nature, to which, as the appellant argues, she would have had an answer, not open to her on the *habeas corpus*, and which she desired to set up.

It was the right of the respondent, however, to determine by what form of proceeding he would invoke the assistance of the Court, and it would be an extraordinary exercise of the powers of amendment or of directing a special mode of trial, to compel him to abandon a remedy deliberately chosen by him, and compel him to adopt one which for any reason he might deem less advantageous to himself or more so to his adversary.

The power given by the Rule is to *amend* any defects or errors, not to compel a litigant to adopt a different form of remedy for one which is in itself competent and regular.

If facts existed which might entitle the respondent to retain the custody of the children, but which, notwithstanding the return and the judgment of the Court in favour of its sufficiency, she could not rely upon as an answer to the demand of the father under the writ of *habeas corpus*, she was not precluded from presenting them upon an independent application on her own behalf, as was done in *Andrews v. Salt*, L. R. 8 Ch. 622.

For these reasons we should have been of opinion that we ought to rescind the order made at the trial, had it not appeared on the argument that the respondent had so far acquiesced in it as to present the petition thereby directed.

The Court had jurisdiction to entertain such a petition, although not presented in a cause, and although no property is concerned, and the infants are not wards of Court; *Simpson on Infants*, 133; *Re Spence*, 2 Phill. 247, 252; and having presented it, we do not see on what principle it is now open to the respondent to complain of the order; and this disposes of the cross-appeal.*

* The same rule was applied in *International Wrecking Co. v. Lobb*, 12 P. R. 207.

Then as to the appeal, it appears to us to be a most unnecessary one. The petition and *habeas corpus* are both before the learned trial Judge, and his power to interpose on behalf of the infants or their mother, if more unfettered in one form of proceeding than the other, a question which we do not now find it necessary to decide, is, at all events, co-extensive with the scope of the more elastic of the two. They are directed to be tried together and must be disposed of together, and it has not been shewn that any substantial difficulty or complication is likely to arise in doing so.

We think the appeal should also be dismissed.

Appeal and cross-appeal dismissed with costs.

IRWIN & Co. v. BROWN.

Counter-claim—Defence—Reply—Jurisdiction of Court—Foreign defendant—Assets in jurisdiction—Con. Rule 271.

A counter-claiming defendant is not a plaintiff in an action ; nor is a counter-claim an action.

The defence of the plaintiff to a counter-claim is technically the plaintiff's reply, notwithstanding Con. Rule 379, and there can, without leave, be no further pleading by the defendant but a joinder of issue.

To a counter-claim against the plaintiff, who lived out of Ontario, seeking the recovery of a debt contracted out of Ontario, the plaintiff pleaded that the Court had no jurisdiction, and the defendant replied, without obtaining leave, that the plaintiff had assets in Ontario to the value of \$200.

Held, that this reply, even if leave were obtained, was bad, because sub-sec. (e.) of Rule 45, O. J. A., has not been incorporated in the Consolidated Rules. See Con. Rule 271.

[November 17, 1888.—*The Master in Chambers.*]

MOTION by the plaintiffs to strike out paragraph 2 of the defendant's reply to the plaintiffs' answer to the defendant's counter-claim.

The plaintiffs lived out of the jurisdiction, and brought this action for a debt alleged to be due; the defendant counter-claimed against the plaintiffs also in respect of a debt, which arose entirely out of the Province of Ontario; the plaintiff answered pleading to the jurisdiction of the Court; and the defendant replied (paragraph 2) that the plaintiff had assets in Ontario to the amount of \$200.

The motion was argued 16th November, 1888.

W. M. Douglas, for the motion.

Douglas Armour, contra.

Judgment was delivered on the 17th November, 1888.

THE MASTER IN CHAMBERS.—A counter-claiming defendant is not a plaintiff in an action, nor is a counter-claim an action. This is quite settled, under the English Rules, by the opinions of many Judges. Section 2 of the Judicature Act declares that a plaintiff "shall include every person asking any relief (otherwise than by way of counter-claim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise."

See *Lewin v. Trimming*, 21 Q. B. D. 230, and *Chatfield v. Sedgwick*, 4 C. P. D. 459, where it was held that though a counter-claim is to have the same effect as a cross-action, it is, nevertheless, not an action. See *McGowan v. Middleton*, 11 Q. B. D. 464 at p. 468.

I must hold Brown, who counter-claims in this case, not to be a plaintiff. He is in an analogous position to a plaintiff in a cross-action; and this reminds me of the dictum of Lord Coke, that "that which is like is not the same."

Then do our rules as to counter-claim make any difference in this respect? Whatever a counter-claim may be besides, it is first and principally a defence to the plaintiff's action. I think it still remains so under the recent rules; for it will be observed that in them, whenever the word "plaintiff" is used it means, not the counter-claiming defendant, but the plaintiff in the suit. This is very distinct in the whole series, from 371 to 383.

And the reply is still the last pleading that may be without leave, other than a mere joinder of issue, and the reply is treated in these rules (as it always was) as a pleading by the plaintiff.

It is true that in rule 379 there is a peculiar expression. In speaking of the answer to a counter-claim, the word "defence" is used instead of the word "reply," as in the old rule 167, and the word is expressed to apply to an answering plaintiff. That might make one suspect that there was some intention in the mind of the draftsman of that rule to make the defendant as to his counter-claim a plaintiff, and the plaintiff in the action a defendant to the counter-claim.

But this is too much to found on that expression, in the face of the authorities, which are so clear. If that were the intention, plain language under the circumstances should have been used to indicate it. It could only have been a half formed intention, not thought out, nor attempted to be carried into action.

I think it results that the defence of the plaintiffs to the counter-claim is the plaintiffs' "reply" technically; and that by consequence there can, without leave, be no answer by the defendant but a joinder of issue.

Perhaps Rule 425 affords a resource to the defendant, if he wants a resource. It would in this case; and it would be proper now perhaps to allow the defendant to amend under it upon terms. But here the trouble is, that the matter of his rejoinder is no answer. It used to be the law that it was a sufficient reason for charging a foreign resident with a claim for debt on a service out of Ontario, that he had property to \$200 in Ontario which might be rendered liable to the claimant's execution, should he recover judgment.

That is not the law now.* So I strike out paragraph 2 of the defendant's answer to the plaintiffs' defence to the counter-claim, on both the grounds argued.

*See Rule 45 (e) of the Ontario Judicature Act, 1881, and Con. Rule 271.

REGINA V. LAVIN.

Warrant of commitment—Conviction—Variance—Motion to discharge prisoner—Enlargement—R. S. C. ch. 176, sec. 24.

In determining, upon a motion to discharge a prisoner, whether a warrant of commitment is defective, the Court cannot, in view of the Summary Trials Act, R. S. C. ch. 176, go behind the conviction; and the proper course where there is a conviction sufficient in law, and a variance between the conviction and warrant of commitment, is to enlarge the motion so as to enable the magistrate to file a fresh warrant in conformity with the conviction.

And where the conviction alleged that the offence was committed in January, 1887, and the commitment January, 1888, the motion was enlarged accordingly.

[October 1, 1888.—*MacMahon, J.*]

Bigelow, on the 20th July, 1888, obtained a writ of *habeas corpus* directed to the superintendent of the Mercer reformatory, on which was indorsed a consent dispensing with the production of the body of the prisoner, who was then confined in the reformatory. In answer, as to the cause of the prisoner's detention, the superintendent made a return on a copy of the commitment made by the police magistrate of Toronto, dated the 13th June, 1888, committing the prisoner to the reformatory for a period of six months, on a conviction for unlawfully keeping a house of ill-fame in Toronto.

On the same day, 20th July, a writ of *certiorari* was issued, directed to George T. Denison, Esq., Police Magistrate of Toronto, to return the conviction and proceedings against the prisoner Kate Lavin, who had been sentenced by him to imprisonment in the reformatory for six months for keeping a house of ill-fame in the city of Toronto.

On the 27th September *Bigelow* moved to discharge the prisoner from custody under the *habeas corpus*, upon the ground that the warrant of commitment was bad on its face, and was illegal because it stated that the prisoner was on "that day (the 13th day of June, 1888,) convicted," when in fact she was convicted during the previous year, and it was urged that the recitals in the commitment shewed such to be the fact.

Badgerow shewed cause.

MACMAHON, J.—The conviction is before me under the return to the *certiorari*, so I can examine it for the purpose of seeing if the commitment is defective by reason of its not conforming in any material particular to the conviction ; for where the detention is under a warrant of commitment which is illegal, or which is bad on its face, the prisoner is entitled to be discharged under the writ of *habeas corpus*.

The prisoner was convicted under the Act respecting offences against public morals (R. S. C. ch. 157) sec. 8, subsec. (j.) for being the keeper of a house of ill-fame.

By the 4th sec. of the Summary Trials Act, (R. S. C. ch. 176), the jurisdiction of the Police Magistrate “shall be absolute in the case of any person charged, within the police limits of any city in Canada, with therein keeping * * any house of ill-fame or bawdy house, and shall not depend on the consent of the person charged to be tried by such magistrate, nor shall such person be asked whether he consents to be so tried.”

Under sec. 24 of the Summary Trials Act it is provided that “no conviction, sentence, or proceeding under this Act, shall be quashed for want of form ; and no warrant of commitment upon a conviction shall be held void by reason of any defect therein, if it is therein alleged that the offender has been convicted, and there is a good and valid conviction to sustain the same.”

The conviction drawn up is as follows :

“Province of Ontario, county of York, to wit :

“Be it remembered that on the 13th day of June, 1888, Kate Lavin, being charged before me, the undersigned Geo. T. Denison, Esq., P. M., in and for the said city of Toronto, (and consenting to my deciding upon the charge summarily) is convicted before me, for that the said Kate Lavin within the past three months, to wit : on the 12th day of January, 1887, and on divers other days and times between that day and the day of the laying of the information herein, at the city of Toronto, in the county of York, unlawfully did keep a certain house of ill-fame situate at

No. 40 on Trinity Square, in the said city of Toronto, against the form of the statute in such case made and provided. And I adjudge the said Kate Lavin for her said offence to be imprisoned in the Andrew Mercer Ontario Reformatory for Females, (and there to be kept at hard labor) for the space of six months."

The warrant of commitment recites :

" That on the 13th day of June, 1888, Kate Lavin, being charged before me, the undersigned George Taylor Denison, Esq., P. M. in and for the said city of Toronto, is convicted before me, for that she, the said Kate Lavin, within the past three months, to wit, on the 12th day of January, 1888, and on divers other days and times between that day and the day of the laying of the information herein," &c.; following the conviction in setting out the offence of which the prisoner was convicted and the adjudication of punishment.

The conviction, although dated the 13th day of June, 1888, is for an offence said to have been committed in the month of January in the year 1887, while the warrant of commitment, which bears the same date as the conviction, recites that it is on a conviction for an offence committed by the prisoner in the month of January in the year 1888,

The question to be considered on the application for the prisoner's discharge is, whether there is "a good and valid conviction to sustain the commitment," where the conviction is for an offence committed a year prior to that recited in the commitment?

The proper course where there is a conviction sufficient in law, and there is a variance between the conviction and the committal, is to enlarge the motion so as to enable the magistrate to file a fresh warrant of commitment in conformity with the conviction returned: see *Rex v. Rogers*, 1 D. & R. 156; *Rex v. Taylor*, 7 D. & R. 622; *Regina v. Chaney*, 6 Dowl. 281; and other cases cited by Wilson, C. J., in *Arscott v. Lilley*, 11 O. R. at pp. 165, 166.

The motion is enlarged until the 13th instant to enable the Police Magistrate to file a fresh commitment to follow the conviction.

WOLFF V. OGILVY.

RE HAGAR.

Lunatic—Intervention of official guardian—Con. Rules 335 to 338—R. S. O. (1887) ch. 44, sec. 32.

Where a defendant in an action becomes of unsound mind after judgment, it is not proper to notify the official guardian to intervene without serving the defendant and obtaining an order of the Court, by procedure analogous to that provided by Con. Rules 335 to 338.

But where a person has been found by the Court to be of unsound mind, the official guardian may be served without order or notice to the lunatic.

Sec. 32 of R. S. O. (1887) ch. 44 must be limited to cases mentioned in the marginal note thereto, which correctly defines the scope of the enactment.

[October 3, 1888.—*Boyd, C.*]

THESE two cases are reported together for convenience.

They were argued before *Boyd, C.*, in Chambers, on the 1st October, 1888.

In the first case, *Langton*, for the plaintiff, moved upon notice to the defendant for an order appointing the official guardian to represent a defendant who became of unsound mind after judgment, but had not been so found.

J. Hoskin, Q. C., the official guardian, contended that an order was unnecessary.

In the second case, *W. Barwick*, for the foreign curator of a lunatic, so found by the foreign Court, moved for an order for payment out of Court of moneys for the lunatic's maintenance.

J. Hoskin, Q. C., for the lunatic.

BOYD, C.—In *Wolff v. Ogilvy*, the application under the Rules 335-338, or rather by analogy to them, is right. The defendant became of unsound mind after judgment, and it is not proper to allow the official guardian to intervene upon notice, without first serving the defendant and obtaining an order. The statute ch. 44, sec 32 (R. S. O. 1887) must be limited to cases mentioned in the marginal note ;

though that is not of any authority, yet in this case it correctly defines the scope of the enactment.

In *Re Hagar*, the official guardian may be served without order or notice to the person he is called on to represent, because the latter has been already found by the Court to be of unsound mind.

RE YOUNG V. PARKER & CO.

Prohibition—Division Court—Judgment summons—Partnership—R. S. O ch. 51, sec. 108, sub-secs. 4, 5, 6.

After judgment obtained against the firm of P. & Co. in a Division Court, upon service of summons on M. P., who was in fact the only member of the firm, an after-judgment summons was issued and served on R. P. The Division Court Judge determined that R. P. had made himself liable as a partner by holding himself out as such, and was bound by the judgment, and liable to be examined as a judgment debtor.

Held, on motion for prohibition, that sub-secs. 4, 5, and 6 of sec. 108 of the Division Courts Act, R. S. O. ch. 51, are applicable only to persons who are in truth partners; and prohibition was ordered.

Munster v. Railton, 10 Q. B. D. 475; 11 Q. B. D. 435; 10 App. Cas. 680, referred to.

[November 22, 1888.—*Armour*, C. J.]

THE plaintiff on the 14th of April, 1888, brought suit against the firm of "Parker & Co.," in the first Division Court of the county of Simcoe, to recover \$80.64 in respect of the amount of a promissory note dated the 2nd February, 1888, made by "Parker & Co.," payable one month after date, to the plaintiff's order, for the sum of \$95.64. The writ of summons was served personally on Mrs. Robert Parker (Margaret Parker) and judgment was signed against Parker & Co. on 7th May, 1888. Margaret Parker was in fact the only member of the firm of "Parker & Co." On 19th June, 1888, an after-judgment summons was issued in the said Court and cause, and was on the 22nd of June, 1888, served on Robert Parker, the husband of Margaret Parker. Robert Parker appeared to the said summons, and denied that he was a partner of the firm of Parker and Co.

The learned Judge thereupon directed that the plaintiff should shew by evidence that Robert Parker was a member of the firm of Parker & Co., and evidence was thereupon given before him by the plaintiff, Margaret Parker, Robert Parker, and one J. H. Parker, and upon hearing such evidence the learned Judge determined that Robert Parker had made himself liable as a partner of the firm of Parker & Co., by holding himself out as such, and that the judgment bound him, and that he was therefore liable to be examined as a judgment debtor, and he so directed.

On the 13th of November, 1888, *H. Lennox*, for Robert Parker, applied for a prohibition, on the ground that the applicant was never served with any summons or paper in the action, that he, Robert Parker, was never a member of the firm of Parker & Co., and that he was not a defendant in the action.

A. H. Marsh shewed cause.

Judgment was given on the 22nd November, 1888.

ARMOUR, C. J.—The after-judgment summons to Robert Parker was issued without jurisdiction, and the order of the learned Judge directing him to be examined thereunder was also without jurisdiction, and the prohibition must therefore go.

Robert Parker was never a member of the firm of Parker & Co., but the learned Judge held that he had, by his conduct to the plaintiff, precluded himself from denying that he was a member of that firm.

Sub-sections 4, 5, and 6 of section 108 of the Division Courts Act, R. S. O., (1887) ch. 51, under the supposed authority of which the said after-judgment summons was issued, and the learned Judge acted, are applicable only to persons who are in truth partners, and not to person who, not being in truth partners, have precluded themselves by their conduct from denying that they are.

See *Munster v. Railton*, 10 Q. B. D. 475; S. C., 11 Q. B. D. 435; S. C., sub. nom. *Munster v. Cox*, 10 App. Cas. 680.

ARCHER ET AL. V. SEVERN ET AL.

Costs out of estate—Interest upon from taxation.

Costs of all parties of an action for the construction of a will were ordered to be paid out of the estate of the testator, and were taxed in 1883, but there were no funds available for their payment until 1888.

Held, that interest upon these costs could not be allowed out of the estate.

[November 1, 1888.—*Ferguson, J.*]

On the 31st October, 1888, *H. Cassels*, for the plaintiff Booth and the defendant George Severn, the executors of the late John Severn, made application to the Court for an order allowing the payment out of the estate of the testator of interest on costs. The suit had been brought for the construction of the will of the testator, and parties interested had appealed from the original judgment to the Court of Appeal for Ontario and to the Supreme Court of Canada. Costs were awarded to all parties, to be paid out of the estate, after taxation. These costs were taxed in 1883, but owing to one of the executors having applied the assets of the estate in payment of his own claim as a beneficiary, there were no funds available for their payment. In 1885 a receiver was appointed, and he, after collecting some of the assets of the estate, paid to the various parties entitled dividends upon their costs, but had not received sufficient to pay them in full. Certain of the beneficiaries, whose lands were charged under the will with large amounts, agreed, in consideration of having all the assets of the estate handed over to them, to assume and liquidate, at once, all the liabilities of the estate including the payment of the costs; and the suit had been settled, with the approbation of the Court, on these terms.

Snelling, for these parties, objected to the allowance of interest.

Judgment was delivered on the 1st November, 1888.

FERGUSON, J.—As to interest upon costs directed to be paid out of the estate, which is now contended for, it seems to me simple justice that such interest should be allowed; but looking at the case *Attorney-General v. Nethercote*, 11 Sim. 529, referred to by Dr. Snelling; the remarks found in *Seton* on Decrees, 4th ed. at pp. 130 & 131; the Imperial Act 23 & 24 Vic. ch. 127, sec. 27, also referred to by Dr. Snelling; as also the case of *Attorney-General v. Bishop of St. David's*, referred to in *Seton*, at pp. 555 & 556, and the remarks upon or in respect to both those cases in the same volume at p. 567, and the authorities referred to by Mr. Cassels,* I think I am precluded by authority from making an order allowing this interest, and for this reason alone I decline so to do.

The costs of this application will be allowed to all parties out of the estate.

RE CHAMBLISS AND CANADA LIFE ASSURANCE COMPANY.

Administrator ad litem—Con. Rule 311.

C. joined his wife in executing a mortgage on her land to a company, covenanting for payment, and then died intestate.

The company, being about to begin an action to realize their claim on the mortgage, desired to have C.'s estate represented for the purpose of claiming against it for any deficiency. No letters of administration having been taken out,

Held, that it was proper to appoint an administrator *ad litem* under Con. Rule 311.

[November 13, 1888.—*Ferguson, J.*]

THE Canada Life Assurance Company were mortgagees of certain land mortgaged to them by Mrs. Sallie S. Chambliss. Her husband, William P. Chambliss, executed the mortgage, which contained the usual covenant for payment

* R. S. O. 1887, ch. 44, secs. 85-88; *Schroeder v. Cleugh*, 46 L. J. Q. B. 365; and *Re McClive*, 9 P. R. 213.

by both husband and wife. After the execution of the mortgage the husband died, and subsequently the wife, leaving four children, one being an infant. Administration was taken out to the estate of the wife, but not to that of husband. The assurance company desired to sell the land, and if the proceeds of sale should prove insufficient to satisfy their claim, to have the deficiency paid out of the estate of the husband, who was liable under his covenant.

Before beginning any action the assurance company applied to the Court under the Con. Rules 310, 311, for an order appointing an administrator to the estate of William P. Chambliss, and Robertson, J., the presiding Judge, directed notice to be given to the children of William P. Chambliss. Notice was given accordingly, and on the 13th November, 1888,

Bruce, Q. C., for the assurance company, moved for the order, submitting that it was a proper case for the appointment of an administrator *ad litem*, who would watch the proceedings in the suit, and guard the interests of the husband's estate; that general administration was not required, for if the land realized sufficient to pay the company's claim, there would be no resort to his estate.

No one for the children.

FERGUSON, J.—I am of opinion that the applicant is entitled to the order, which may go appointing Mr. Davidson, a solicitor of this Court.

NOTE.—Is it proper to actually commence the action before making the application? The most convenient form of order may be drawn up.

The order was issued on the 20th November, 1888, entitled both, "In the matter of a mortgage made by Sallie S. Chambliss," &c., and in the action (which had meanwhile been begun) of the Canada Life Assurance Company against the administrator of the estate of Sallie S. Chambliss.

The order was as follows:

1. This Court doth order that William Davidson, of the city of Toronto, in the county of York, Esquire, one of the solicitors of the Supreme Court of Judicature, be and he is hereby appointed for the purpose of the said

action administrator of the real and personal estate of the late William P. Chambliss, and that the said William Davidson, as such administrator *ad litem*, be added as a party defendant in the said action, and that the writ issued in the said action be amended accordingly and that the indorsement on the said writ be amended by making the claims against the said William Davidson as such administrator *ad litem* as well as against the said defendant Armour.

2. And this Court doth further order that security by the said William Davidson as such administrator *ad litem* be dispensed with.

3. And this Court doth further order that the costs of the said William Davidson in the said action be taxed and paid by the plaintiffs, and added by the plaintiffs to the amount of their claim in the said action.

4. And this Court doth further order that the costs of this motion be costs in the cause.

LONDON AND CANADIAN LOAN AND AGENCY CO. V. GRAHAM.

Costs—Specific performance—Vendor and purchaser—Title, when shewn—Demand of abstract.

Held, in an action for specific performance, that shewing title is the manifestation on the abstract of all matters essential to a good title, and that as the defendant had demanded no abstract before action, he could not complain that title was first shewn thereafter, and he was ordered to pay the costs thereof.

Bridges v. Longman, 24 Beav. 27, cited and followed.

[November 23, 1888.—*Boyd*, C.]

THIS was a motion for judgment on further directions in an action by vendors for specific performance (reported 16 O. R. 327,) and for costs, argued on the 21st November, 1888.

Arnoldi, for the plaintiffs, referred to *Laird v. Paton*, 7 O. R. 137.

Hewson, for the defendants, contra, cited *Haggart v. Quackenbush*, 14 Gr. at p. 702.

Judgment was delivered on November 23rd, 1888.

BOYD, C.—It was conceded that the plaintiffs should have costs down to judgment, but it was asked by the defendant that costs should be given to him thereafter. But the defendant appears to have been to blame for the litigation throughout. The matter was referred to the Master to report if a good title could be made, and if so, when it was first shewn. He reports in favour of the title, and finds that it was first shewn in his office. But he also reports specially that there was no demand of any abstract or investigation of title or requisition in respect of title before action.

Now, *shewing* title is the manifestation on the abstract of all matters essential to a good title, and as the defendant demanded no abstract before action, he cannot object that title was first shewn thereafter. That was not the point in dispute, and this case falls within that class of which *Bridges v. Longman*, 24 Beav. 27, is a typical instance, where all costs are to be paid by the defendant, though a good title was not shewn till after the institution of the suit. Such will be the judgment as to costs here.

PATTERSON v. GILBERT.

Report—Confirmation—Order—Consent.

Unless by consent, a report cannot be confirmed until after the lapse of the time limited by Con. Rule 848.
It is an undesirable practice for an officer to make an order confirming his own report.

[December 14, 1888.—*Rose, J.*]

THIS was an appeal by the defendant from an order of the local Master at Hamilton, in Chambers, dated the 4th of December, 1888, made on the application of the plaintiff confirming his (the Master's) own report in this action, and dated the 28th of November, 1888. The grounds of appeal, in addition to objections to the findings in the report itself

mentioned in the notice of motion, were : (1) That the order of confirmation was made within six days after the making and filing of the report without the consent of the defendant, although the defendant's solicitor attended at the time and objected ; (2) That there is no jurisdiction in an officer to confirm his own report.

The appeal was argued in Chambers on the 11th December, 1888.

W. H. Blake, for the appeal, referred to the long standing and well established practice, that a report will not be summarily confirmed, and the right of appeal thus barred, except by consent.

H. H. Robertson, for the plaintiff, referred to *Holmsted's* Rules and Orders, vol. 1, p. 133, where it is said : " Reports which require confirmation may be confirmed by special order before the expiration of the time limited for appealing therefrom, upon notice to or consent of all parties interested."

Judgment was delivered on the 14th December, 1888.

ROSE, J.—I have conferred with the learned Chancellor of Ontario as to the practice in the Court of Chancery and Chancery Division upon the questions raised in this appeal. He informs me that there never has been any practice warranting the confirmation of a report, except on consent, until after the lapse of the time provided for the same becoming absolute. See G. O. Chy. 282 and Con. Rule 848. The Rule confers a right on the parties interested in a report of which they must not be deprived without their consent.

As to the other ground of appeal, we also agree that, even if in strictness permissible, it would not be advisable for an officer to confirm his own report.

The appeal is, I think, strictly in order, and I allow it with costs. The defendant will be at liberty to deduct such costs from the moneys of the estate in his hands.

TRUST AND LOAN COMPANY V. GORSLINE.

Receiver by way of equitable execution—Attachment of debts—Salary not yet due.

Judgment creditors on the 7th December, 1888, moved for a receiver by way of equitable execution to receive money which they alleged would be due to the judgment debtor on the 21st December, 1888, for salary as a school-master.

Held, that if the debt was one which could be garnished, the judgment creditors should attach it; if it could not be garnished, it was because there was no debt at all.

Kincaid v. Kincaid, 12 P. R. 462, distinguished.

[December 11, 1888.—*Street, J.*]

On the 7th December, 1888, *A. H. Marsh*, for the plaintiffs (judgment creditors), moved the Court on notice for an order for a receiver by way of equitable execution to receive moneys coming to the defendant (judgment debtor) as salary, and any other moneys coming to him, to the extent of their judgment debt.

No one appeared for the defendant.

Judgment was delivered on the 11th December, 1888.

STREET, J.—This is an application by the plaintiffs for the appointment of a receiver. The grounds of the application are that the plaintiffs have judgment for \$584.65 against the defendant, and that a sum of \$175 for salary as school teacher will be due the defendant on 21st December, instant, which the plaintiffs wish to obtain, and to apply upon their debt.

I do not think the application should be granted. If the debt is one which might be garnished, then the plaintiffs should take proceedings to recover it under the garnishee clauses. If it cannot be garnished, it must be because there is no debt at all. In *Kincaid v. Kincaid*, 12 P. R. 462, a different question was presented; the question there was whether the debt was a legal or an equitable debt; if the former, it might have been garnished; if the latter, then an equitable execution was the appropriate

remedy; and in order to avoid any question as to the remedy, a receiver was appointed, who could collect it either as a legal or an equitable debt. Here the question is not whether the debt is a legal or an equitable one, but whether there is any debt in existence at all, and as a plain remedy under the garnishee clauses exists if there is a debt, I must, I think, refuse to enlarge the plaintiffs' rights by granting the application.*

As no one appeared for the defendant, there will be no order as to costs.

* See *Manchester, &c., Banking Co. v. Parkinson*, Weekly Notes, December 22, 1888, p. 243.

DOMINION BANK V. DODDRIDGE.

Notice of motion for judgment—Dispensing with service of—Con. Rule 467—"Sufficient cause."

Upon a motion to the Court for judgment on the statement of claim in default of defence, the plaintiffs asked for an order dispensing with service of notice of the motion upon the defendant under Con. Rule 467.

It was not shewn that the defendant could not be served.

The order was refused.

Held, that the fact that the defendant had been personally served with the writ of summons and statement of claim and had not appeared was not "sufficient cause" within the meaning of the Rule.

[December 20, 1888.—*Robertson, J.*]

AN action upon a guaranty.

The writ of summons and statement of claim were served personally on the defendant in this Province, but he did not appear or deliver a statement of defence; and the plaintiffs set the case down on motion to the Court for judgment on the statement of claim on the 19th December, 1888, on which day *W. N. Miller, Q. C.*, for the plaintiffs, asked, under Con. Rule 467, to have service on the defendant of notice of motion for judgment dispensed with.

Judgment was delivered on the following day.

ROBERTSON, J.—The writ and statement of claim were personally served on the defendant in this Province. Notice of this motion was not served. Final judgment is asked for. In my judgment, any motion made in Court of the importance of a motion for judgment, in fact whether of so much import or not, should be preceded by the service of a notice made on the opposite party at least two clear days between its service and the day for hearing (Rule 479); but under Rule 467, "Where it appears, upon the hearing of any matter that by reason of absence, or for any other sufficient cause, the service of notice, &c., cannot be made, or ought to be dispensed with, such service may be dispensed with, or any substituted service, or notice, by advertisement, or otherwise, may be ordered." Here the party evidently could be served, at least it is not pretended that he could not; but it is argued that as he has not appeared to the writ, nor filed a defence, that is "sufficient cause" for dispensing with the notice. I cannot see my way to adopting that view, and I quite concur in the expression of Rose, J., in *Thomas v. Storey*, 11 P. R. 417, where he says: "No order of any moment should be made *ex parte*, except in a case of emergency"; and I understand that my brother Proudfoot, some time ago, gave a like decision, but I have not been able to lay my hands on the report.* I also refer to *Hooey v. Gilbert*, 12 P. R. 114; *Taylor v. Sisters of Charity*, 11 P. R. 496.

I must, therefore, refuse the motion.

*See *Hamilton v. Tweed*, 9 P. R. 448.

SMITH ET AL V. FLEMING ET AL.

Costs—Covenant for renewal lease, construction of—Costs of lease—Costs of reference and award—Costs of action for arbitrators' fees.

[December 22, 1888.—*The Queen's Bench Division.*]

AN appeal by the defendants the Rector and Wardens of St. James's Church, Toronto, from the judgment of Ferguson, J., ante p. 520, was argued before the Divisional Court on the 20th November, 1888, by

J. K. Kerr, Q.C., and *Arnoldi*, for the appellants; and
S. H. Blake, Q.C., and *Tilt*, Q.C., for the respondent, the defendant Fleming.

On the 22nd December, 1888, the Court gave judgment dismissing the appeal with costs, and affirming the judgment on substantially the same grounds.

ARMOUR, C. J., referred to *Marsack v. Webber*, 6 H & N. 1, as an authority for the disposition made of the costs of the arbitration.

FALCONBRIDGE, J., referred to and distinguished *In re Autothreptic Steam Boiler Co.*, 21 Q. B. D. 182.

WILGRESS V. CRAWFORD.

Foreclosure—Subsequent incumbrancer—Reference—Interlocutory order—Amending judgment.

There is no authority in a mortgage action for foreclosure to make a reference by interlocutory order to a master to add parties with the object of allowing them to redeem or having them foreclosed.

And where the plaintiff in a mortgage action obtained the usual foreclosure judgment and had his account taken thereby without a reference, and after final order of foreclosure discovered that a subsequent incumbrance existed, the judgment was amended under Con. Rules 780 and 781 so as to convert it into a judgment under Con. Rule 776, with a reference to the Master in Ordinary to add incumbrancers, take the accounts, &c.

[December 11, 1888.—*Street, J.*]

IN this action the plaintiff, on the 16th of April, 1888, recovered the usual foreclosure judgment, and his account was taken without a reference, the amount being directed to be paid into a bank on 17th October, 1888, and a final order of foreclosure was obtained. It was afterwards discovered that a subsequent incumbrance existed, the owner of which should have been added as a party, and that the judgment should therefore have contained a reference to the Master in Ordinary to add parties, &c., under Con. Rule 776.

The plaintiff now petitioned the Court for an order referring the matter to the Master to add the incumbrancer, and take the accounts, &c., and the petition came on for hearing on the 7th December, 1888.

H. T. Beck, for the petitioner.

Judgment was delivered on the 11th December, 1888.

STREET, J.—I am of opinion that the judgment itself, upon which the whole proceedings are founded, must be amended so as to convert it into such a judgment as is authorized by rule 776, before the plaintiff can obtain the relief he asks. The only reference authorized by the Rules in mortgage actions, where the result is intended to be the foreclosure of a right, and where the parties to be fore-

closed are to be added by the Master, is a reference by the judgment: there is no authority to make such a reference by an interlocutory order.

If the plaintiff desires it the present judgment may be amended under rules 780 and 781, but this will necessitate the opening of the whole matter, and the reference must proceed treating the former judgment, and the proceedings under it, as a nullity; because under the existing judgment the amount was ascertained by the Court itself, while under the judgment, if amended, the Court refers to the Master in Ordinary the question of the amount.

RE DICKSON INFANTS.

Infants—Habeas corpus—Right of father to custody—Age of infants—Habits of parents—Religious belief—R. S. O. ch. 137, sec. 1.

Upon an application by the father of two infants, under the ages of five and three respectively, for a *habeas corpus* to obtain their custody from the mother, it appeared that the applicant was a man of drunken habits and of evil conversation, that he had beaten his wife and so ill-treated her that she was justified in leaving him, while she was a moral and sober woman. It was also shewn that the maternal grandmother of the infants was able and willing to give them a home with their mother, who lived with her, while the paternal grandmother was neither able nor willing to do so.

Held, that, having regard to the welfare of the infants and the conduct of the parents, the mother should have the custody for the present.

It was urged that the father had a right to have the children brought up as Presbyterians, and that the mother and her mother were both members of the Salvation Army.

Held, that this question was not a pressing one owing to the tender age of the infants; the father might raise it again.

Held, also, that, having regard to the wide discretion given by R. S. O. ch. 137, sec. 1, the Judge was freed from any possible obligation to make, upon the application of the father, an order which would be reversed on the application of the mother.

[December 11, 1888.—*Street, J.*]

AN application by the father of two infants for a *habeas corpus* to compel their mother to deliver them to him.

It was argued before Street, J., in Chambers on the 4th December, 1888.

F. E. Hodgins, for the father.

W. H. P. Clement, for the mother.

The facts appear in the judgment, which was delivered on the 11th December, 1888.

STREET, J.—This is an application by Arthur Dickson, the father of John Dickson and Lillie Dickson, for a writ of *habeas corpus* in order to compel Jane Dickson, their mother, to deliver them to him. The infants are under the ages of five and three years respectively. The affidavits filed upon the motion are more than usually contradictory. I am satisfied from them that the applicant is a man of drunken habits; that he has on more than one occasion beaten his wife; that she was justified in leaving him on account of his ill treatment; and that his habits and conversation render him unfit to have the charge of these children. I am not satisfied that there were not faults on the part of the wife, which, in some degree, may have contributed to the trouble, but much allowance is to be made for a wife treated as this one appears to have been. She, at all events, appears to be a moral and sober woman. The applicant asks that the children should be delivered to him in order that he may put them under the care of his mother and sister. His mother and sister, however, say that they are neither able nor willing to take charge of them, and that they think the children should be allowed to remain in their mother's charge. On the other hand the mother of the children is living with her own mother, who swears she is able and willing to maintain them, and they appear to be in good hands where they are, and to be well clothed and properly fed and cared for.

It is urged that the father has a right to have the children brought up as Presbyterians, and that their mother and her mother are both members of the Salvation Army.

A perusal of the evidence leads me to the conclusion that as between the religious training to be at present expected from the father and that of the Salvation Army, I should choose the latter. When the children are older the father may have a right to raise this question again, but at present it does not appear to be a pressing one owing to the tender age of the children.

It was pressed that upon an application for *habeas corpus* the mother's rights were of a more limited character than upon a petition under the former Chancery practice, and *Re Smart*, 12 P. R. 312, was cited in support of this contention. The precise nature of the objections to the continuation of the proceedings under the *habeas corpus* in that case, which induced the Judge to allow a petition to be filed in its stead are not stated in the reported decision. Since that case, however, the powers of the Courts in dealing with the custody of infants have been greatly enlarged and simplified by 50 Vic. ch. 21, sec. 1 ; R. S. O. (1887), ch. 137, sec. 1. Having regard to the wide discretion given by that section, I am freed from any possible obligation to make, upon the application of the father, an order which I should feel bound to reverse upon the application of the mother.

Having regard to the welfare of these infants and to the conduct of the parents, I think that the mother should have their custody for the present, and I dismiss the application for the writ of *habeas corpus* with costs.

BURKE V. PITTMAN ET AL.

Indemnity—Relief against co-defendants—Procedure where such relief claimed—Trial of questions raised.

No order is necessary to enable a defendant to plead a claim for indemnity against his co-defendant, but such a claim will not be tried without an order providing for the determination of the question so raised.

P. borrowed money from the plaintiff and then went into partnership with N.; P. and N. afterwards sold the business to B. The plaintiff, having judgment against P., brought this action against P., N., and B. to set aside the sale to B. as fraudulent. P. alleged in his defence that N. agreed to pay half his debts, including that to the plaintiff, and that B. agreed to pay the liabilities of P. and N. appearing on their books, which the liability to the plaintiff did, and he claimed indemnity against N. and B.

Held, [reversing the decision of the Master in Chambers], that the trial of the question whether or not the sale to B. was fraudulent as against the plaintiff would involve an inquiry as to the terms upon which B. purchased from the other defendants, and that the whole matter was one that might be advantageously disposed of at one hearing.

[December 11, 1888.—*Street, J.*]

AN appeal by the defendant Pittman from an order of the Master in Chambers striking out such part of the appellant's statement of defence as claimed indemnity from his co-defendants Norris and Boas.

The appeal was argued in Chambers on the 4th December, 1888.

George Ritchie, for the appellant.

Gunter, for the defendants Norris and Boas.

George Macdonald, for the plaintiff.

The facts appear in the judgment, which was delivered on the 11th December, 1888.

STREET, J.—Defendant Pittman borrowed money from the plaintiff, and then went into partnership with defendant Norris. He alleges that Norris agreed to pay half his debts, including that due the plaintiff. Then Pittman and Norris sold out to defendant Boas, who it is alleged agreed to pay them a certain sum and to pay their liabili-

ties appearing upon their books. The defendant Pittman states that the liability to the plaintiff does appear upon their books.

The plaintiff brings this action to set aside the sale to Boas as being fraudulent and void as against her. The defendant Pittman, in his defence which he has delivered to his co-defendants Norris and Boas, claims indemnity from them against the plaintiff's claim. The learned Master in Chambers, upon the application of Norris and Boas, has ordered this portion of the defence to be struck out as embarrassing the proper trial of the action. From this decision the defendant Pittman appeals. The judgment appealed from is supported by Norris and Boas upon the ground taken by the learned Master, and upon the further ground that this part of the defence could not be pleaded without an order allowing it.

Under Con. Rule 328, founded on Rule 107, Judicature Act, and taking the interpretation placed upon that Rule in *Neald v. Corkindale*, 4 O. R. 317, the delivery of the pleading to a person already a party was a sufficient notice. No order appears necessary to enable a defendant to plead his claim to indemnity against his co-defendant, but the claim so set up against the co-defendant will not be tried without an order providing for the determination of the question so raised. In the present case it appears to me that the question as to whether or not the transfer to Boas was or was not a fraudulent one as against the plaintiff will involve an inquiry as to the terms upon which Boas purchased from the other defendants, and that the whole matter is one which, so far as appears at present, might be advantageously disposed of at one hearing. The plaintiff appeared upon the motion before me and supported the appeal, being desirous that the whole matter might be disposed of at once, in order, perhaps, that she might take the benefit of a finding in the favour of the defendant Norris against the other defendants, if such should be the result of the contest between them.

I find myself compelled to differ from the conclusions at

which the learned Master has arrived, and think the appeal should be allowed.

The costs of the plaintiff of the motion in Chambers and of this appeal to be costs in the cause to him in any event. The costs of the defendant Pittman of the motion in Chambers and of the appeal to be paid by the defendants Norris and Boas.

RE PECK AND TOWNSHIP OF AMELIASBURGH.

By-law—Procedure on motion to quash—Notice of motion—Time.

The proceeding by rule *nisi* to quash a by-law is no longer in force, and the proceeding by motion is substituted for it; but sec. 332 of the Municipal Act, R. S. O. ch. 184, which requires four days' notice of an application to quash, is still in force; and the notice of motion given in this case, being only a two days' notice, was held insufficient.

[December 11, 1888.—*Street, J.*]

THIS was an application by a ratepayer to quash a by-law authorizing the corporation to subscribe for stock in a bridge company. Notice had been served on the reeve, two clear days before the application was made, of a motion to quash the by-law, and no one appeared on the application to represent the corporation.

A. H. Marsh, for the applicant, argued that although sec. 332 of the Municipal Act requires four days' notice to be given, and the application to be by service of a rule *nisi*, the practice must be taken to be governed by Con. Rules 525 and 526 as to the mode of making the application, and by Con. Rule 479 as to the length of the notice to be given.

STREET, J.—Sec. 332 of the Municipal Act provides that "the Court after at least four days' service on the corporation of a rule to shew cause in this behalf may quash the by-law," &c.

Con. Rule 526 provides that no summons, rule, or order to shew cause shall be granted in any action or matter; but when any person other than the applicant is entitled to be heard thereon, he shall be served with a notice of the motion.

Sec. 4 of ch. 2 of 51 Vic. (O.) repeals all enactments of the R. S. O. 1887 inconsistent with the Consolidated Rules.

It would appear, therefore, that the proceeding by rule to shew cause to quash a by-law is no longer a practice which is in force, and that the proceeding by motion is substituted for it.

Con. Rule 479 provides that unless the Court or Judge gives special leave to the contrary, there must be at least two clear days between the service of a notice of motion and the day for hearing the motion.

This does not appear to be inconsistent with sec. 332 of the Municipal Act, which requires four days' notice of the application to quash the by-law to be given.

The application was made to me to quash the by-law on 30th November, 1888, upon two days' notice only. I will, under the circumstances, retain the application, and the applicant may give a four days' notice of the renewal of the motion.

RE CHATHAM HARVESTER CO. V. CAMPBELL.

Arrest—Judgment debtor—Order for examination—Appointment—Failure to attend—Committal—Substituted service of summons—Writ of attachment—Notice to debtor.

Upon the return of a *habeas corpus*, an order was made by a Judge of the High Court for the discharge of the defendant from custody under a writ of attachment issued by order of a County Judge in an action in a County Court.

Held, (1) That an order to examine the defendant as a judgment debtor and an appointment under it together were equivalent to an order that the debtor should attend upon the day mentioned in the appointment, and when he obeyed the order by attending and offering to be examined, its force was spent and the power of the examiner under it at an end; to obtain a fresh appointment, a fresh order was necessary.

Jarvis v. Jones, 4 P. R. 341; *McGregor v. Small*, 5 P. R. 56, referred to.

(2) If an order for substituted service of a summons or notice of motion to commit can be made at all, even under the wide language of Con. Rule 467, it should not be made except in a case where no doubt exists that the notice has come to the knowledge of the person against whom the application is made.

(3) The order asked for by the summons, viz., for the committal of the defendant to the common gaol was the appropriate punishment authorized by R. S. O. (1877) ch. 50, sec. 305, for disobedience to an order to attend for examination; and an order for the issue of a writ of attachment requiring the sheriff to hold the debtor in custody for an indefinite period was improper. At any rate a different order from that indicated in the summons should not have been made in the absence of the debtor.

(4) The writ of attachment under which the debtor was held was improperly issued without notice to him, as required by Con. Rule 879; and it made no difference that it was in lieu of one which had expired.

[December 4, 1888.—*Street, J.*]

THE plaintiffs recovered judgment in the County Court of the county of Kent, against the defendant for a sum of money due them, and after judgment obtained an order dated 7th February, 1887, from the Junior Judge of the county for the examination of the defendant before the clerk of the County Court of Lanark, at Pembroke, under secs. 304 and 305 of ch. 50, R. S. O. (1877). An appointment was taken out under this order, and the defendant attended upon it, but, no one attending for the plaintiff, the defendant went away. Afterwards, upon the same day, the plaintiffs took out and served upon the defendant another appointment under the same order for his attendance upon a future day. Upon that day he did not attend, and he

afterwards explained that he attempted to get to Pembroke from his home to attend upon the examination, but was unable to do so owing to a heavy snow storm. The fact of his non-attendance was certified by the officer before whom he was directed to attend, and a summons to commit him for his non-attendance was sent from Chatham to Pembroke for service; but before it could be served, the defendant had gone away to Dakota. The sheriff's officer who attempted to serve this summons made an affidavit that he had seen the defendant's wife and father, who informed him that the defendant had gone to the United States, and that they did not know when he would return. Upon this affidavit the Junior Judge of the County Court of Kent made an order for substitutional service of the summons upon the wife of the defendant. An affidavit of service upon her of the summons to commit and of the order for substitutional service was produced to the Judge on the 28th March, 1887. The summons called upon the defendant to shew cause on that day why he should not be committed to the common gaol of the county of Lanark (being the county in which he resided) for not obeying the order to attend and be examined.

Upon the production of the affidavit of substituted service on the wife of this summons, and of the order for substitutional service, no one appearing for the defendant, the Judge made an order that a writ of attachment should issue directed to the sheriff of the county of Lanark, and that the defendant should pay the costs of and incidental to the order.

On the 30th March, 1887, a writ of attachment was issued from the County Court of the county of Kent directed to the sheriff of the county of Lanark, commanding him to attach the defendant and to have him "before us in the County Court of the county of Kent," there to answer touching a contempt, &c. The defendant did not return to the jurisdiction until after the date at which this writ had expired. On 1st September, 1888, an affidavit was made by a clerk of the plaintiffs' solicitors that the

defendant had returned to and was then residing in the county of Lanark, and the County Judge of Kent thereupon, on the plaintiffs' application, ordered that they should be at liberty to issue a new writ of attachment in lieu of the former writ issued herein, and a new writ of attachment was accordingly issued without any notice to the defendant. Under this writ, which was similar in its terms to the other, the defendant was arrested on the 5th September, 1888, and has ever since been held under it as a prisoner in close custody in the county gaol of Lanark.

Upon the 20th November, 1888, upon the defendant's application, a writ of *habeas corpus* was issued, and an order was made for the transmission of the papers on file in the County Court of Kent to the Registrar of the Common Pleas Division, and an application was made upon notice to the plaintiffs, for the defendant's discharge from custody.

The application was argued before Street, J., in Chambers, on the 3rd December, 1888.

Aylesworth, for the defendant.

E. Douglas Armour, for the plaintiffs.

Judgment was delivered on the 4th December, 1888.

STREET, J., (after stating the facts as above).—There appear to be many serious defects in the proceedings.

The original order for the examination of the defendant directs that he shall attend before the officer named, at such time and place as he shall appoint, and then and there submit to be examined. Upon this order an appointment was made by the officer and served on the defendant. He duly attended upon the appointment and was ready and willing to submit to examination, but the plaintiffs did not attend. It seems to me that the force of the order was then spent, and that the plaintiffs, before they could obtain a fresh appointment, were bound to obtain a fresh order. If one fresh appointment could be obtained upon

the original order, a dozen might be, and there would be no end to the annoyance to which a defendant might be put at the caprice of the plaintiff.

Under the old practice, under secs. 304 and 305, ch. 50, R.S.O. (1877,) the judgment creditor was entitled to obtain, as a matter of course, one order for the examination of the judgment debtor; but having exhausted that right by compelling the attendance of the debtor before the officer, he could not, in my judgment, have obtained successive orders for the same purpose where, by his own default, the first one had not been acted on, without shewing some excuse for not having proceeded upon the first. The order here, and the appointment under it, together were equivalent to an order that the debtor should attend upon the day mentioned in the appointment: he obeyed the order by attending and offering to be examined, and the force of the order and the power of the officer were then at an end. See *Jarvis v. Jones*, 4 P. R. 341; *McGregor v. Small*, 5 P. R. 56.

I can find no precedent for the order for substitutional service of a notice of motion to commit the defendant to prison. An application for a similar order was refused in a case reported anonymously at p. 105, W. N., 1876. In *Hope v. Carnegie*, L. R. 7 Eq. at p. 260, it is said by Sir John Stuart, V. C.: "The other defect is, that the orders were for substituted service of a notice of motion to commit for a contempt, and this Court, jealous of the personal freedom of the subjects of the Crown, has never, upon any occasion in my experience, entertained a motion to commit for contempt unless on evidence of personal service on the person against whom the motion is made." See also *Mann v. Perry*, 50 L. J. Ch. 251; *Gilbert's* Chy. Pr. 198-9.

In the face of the wide language of the former Chancery Order 199, now consolidated as Rule 467, I hesitate to say that it should in no case be taken to apply to motions to commit or for a writ of attachment; but certainly, if so applied, it should only be in cases in

which no doubt exists as to the notice having come to the knowledge of the person against whom the application is made. In the present case the probabilities were all the other way, as appeared from the material before the Judge who made the order.

The notice of motion was for an order for the committal of the defendant to the common gaol of Lanark. This is the punishment authorized by sec. 305 of ch. 50, R. S. O. (1877,) in force when the motion was made, and is the appropriate punishment provided by that section for a person who has failed to attend under an order for examination: it is directed by that section that this punishment under it shall be for a period limited in point of time. Instead of making the order indicated by the notice of motion, the Judge made an order for the issue of a writ of attachment, requiring the sheriff to hold the defendant in custody for a time not defined. The committal asked for by the notice of motion, and authorized by sec. 305, appears intended to meet the case of one who has committed a single act of contempt, and is to be punished for it by the imposition of a fixed and determined period of imprisonment.

The object of a writ of attachment seems rather to be the enforcing obedience to an order of the Court for the performance of some act which the Court thinks the defendant should do, and for the compelling of which an indefinite confinement until the act is done may be necessary. At all events, the two remedies are distinct in their character, and it is evidently a serious irregularity to serve a notice of motion for the one, and upon its return to take the other, in the absence of the defendant to whom the notice has been given.

Another fatal objection to the writ under which the defendant is held in custody, appears to me to be found in the fact that it was issued without any notice to the defendant. Con. Rule 879, following Rule 365, O. J. A., provides that no writ of attachment shall be issued without the leave of the Court or a Judge, to be applied for on notice to the person against whom the attachment is to be

issued. I cannot see that the fact that the writ was issued in lieu of one which had expired can help the plaintiffs, in the face of the express and positive enactment of this rule.

I think that the defendant should be discharged from custody, and that the plaintiffs should pay the costs of the application and the costs of the order for the writ of *habeas corpus* and of the writ.

LEITCH V. GRAND TRUNK RAILWAY COMPANY.

Discovery—Examination of officer of corporation—R. S. O. (1877) ch. 50, sec. 156—Railway conductor—Discovery before second trial from witness examined at first trial.

Held, (1) affirming the decision of MACMAHON, J., *ante* p. 541, that the conductor of a train of the defendants through whose alleged misconduct the plaintiff was injured was an officer of the defendants within the meaning of R. S. O. (1877) ch. 50, sec. 156, examinable for discovery in an action for damages for the injuries sustained.

(2) Reversing the decision of MACMAHON, J. (FALCONBRIDGE, J., *dubitante*) that such conductor could be examined by the plaintiff before a second trial, notwithstanding that he had been examined as a witness at the first trial, had been cross-examined by counsel for the plaintiff, and had then offered to produce a certain book in his possession.

[December 22, 1888.—*The Queen's Bench Division.*]

AN appeal by the plaintiff from the order of MacMahon, J., *ante* p. 541, reversing an order of one of the local Judges at London for the examination by the plaintiff, for the purposes of discovery, of one David Allison, a conductor of the defendants.

The appeal was argued before the Divisional Court on the 19th and 20th November, 1888.

W. R. Meredith, Q.C., for the plaintiff, relied on *Betts v. Grand Trunk R. W. Co.*, *ante* pp. 86 and 634.

Aylesworth, for the defendants, referred to *Shelley v. Hussey*, 8 P. R. 25.

Judgment was delivered on the 22nd December, 1888.

ARMOUR, C. J.—This is an appeal from the judgment of MacMahon, J., reported in 12 P. R. 541, and two questions are presented for our determination; the first being whether the conductor of a train of the defendants, through whose alleged misconduct the plaintiff was injured, is an officer of the defendants within the meaning of R. S. O. ch. 50, sec. 156; and the second being whether, if such officer, he can now be examined for discovery, a trial of the action having been had which resulted in the disagreement of the jury, and he having been examined as a witness at such trial.

The provision R. S. O. (1877) ch. 50, sec. 156, is a remedial one, and we are bound to give it such fair, large, and liberal construction and interpretation as will best secure the attainment of its object according to its true intent, meaning, and spirit.

The object of the provision is to discover the truth in relation to the matters in question in the action, and the examination ought to be of such officers as are best able to give information respecting such matters.

The conductor sought to be examined is the person best able to give information in relation to the matters in question in this action, and, if an officer of the defendants within the meaning of this provision, is the officer who of all others is the proper officer to be examined in relation to such matters.

“Officer” is a word of very wide signification, and is used in many Acts constituting bodies corporate with the same meaning as “servant,” and the officers of a body corporate are in truth its servants, but whether the servants of a body corporate are its officers must depend upon the special terms of each particular Act constituting the body corporate.

By the Railway Act, R. S. C. ch. 109, sec. 16, sub-sec. 2, *the agents or servants* of the company may seize goods in respect of which tolls are payable, &c. By sub-sec. 12,

no by-law of any company by which any person other than *the shareholders, officers and servants* of the company are intended to be bound, &c. By sec. 18, sub-sec. 17, the directors shall make by-laws for the appointment of all *officers, servants, and artificers*, and prescribing their respective duties. By sec. 18, sub-sec. 18, the directors shall from time to time appoint such *officers* as they deem requisite, and shall take security from the *managers and officers* for the time being, &c. By sec. 24, a printed copy of so much of the by-laws, rules and orders as relates to or affects any person other than the *shareholders or servants* of the company, &c. By sec. 25, every *servant* of the company employed in a passenger train or at a station for passengers shall wear upon his hat or cap a badge to indicate his *office*, and without such badge shall not be entitled to exercise any of the powers of his office. By sec. 25, sub-sec. 2, checks shall be affixed to baggage by an *agent or servant*. By sec. 25, sub-sec. 5, no baggage car shall be placed in rear of a passenger car, and if any such car is so placed the *officer or agent* who directs or knowingly permits such arrangement and the *conductor* of the train shall each be guilty of a misdemeanour. By sec. 25, sub-sec. 9, every passenger who refuses to pay his fare may, by the *conductor of the train and the train servants* of the company, be put out of the train. By sec. 25, sub-sec. 11, notice in writing is to be given to the *station master or other servant* of the company. By sec. 49, every company shall station *an officer* at every point on its line crossed on a level by any other railway. By sec. 53, whenever any railway crosses any public highway on the level, the company shall not, nor shall its *officers, servants, or agents* wilfully permit, &c.; and by sub-sec. 2, every such *officer, servant, and agent* and such company shall incur, &c. By sec. 56, sub-sec. 6, if any *officer, servant, or agent* of any company, &c., such *officer, servant, or agent*. By sec. 57, on the application of any *clerk or agent* of such company thereto authorized by such directors. By sec. 66, the Government engineer may give notice to the *president, managing direc-*

tor, or secretary, or superintendent of the company, or to any officer having the management or control of the running of trains. By sec. 69, every company and the officers and directors thereof shall, &c. By sec. 71, the operators or officers employed in the telegraph offices of or under the control of the company shall, &c. By sec. 85, every company shall make such by-laws, rules and regulations to be observed by the conductors, engine-drivers, and other officers and servants of the company. By sec. 85, sub-sec. 4, every conductor, engine-driver, and other officer and servant of the company. By sec. 85, sub-sec. 5, if the violation or non-observance of any such by-law, by any of the persons or officers in the next preceding sub-section mentioned. By sec. 85, sub-sec. 7, the substance of any such by-law, if it affects any officer or servant of the company. By sec. 85, sub-sec. 8, such by-laws shall be binding upon and be observed by every officer, person and company mentioned in the fourth sub-section of this section. By sec. 86, every company may impose upon any officer, servant, or person who, &c. By sec. 87, proof of notice of the by-law to the officer, servant or person, &c.

I have made these extracts from the Railway Act to shew that no definite distinction is drawn between officers and servants; that the watchman stationed at a level crossing is referred to as an officer; that the station master is referred to as a servant; that telegraph operators are referred to as officers; and that conductors and engine-drivers are treated as officers or servants.

In *Oakley v. Toronto, Grey, and Bruce R. W. Co.*, 6 P. R. 253, the chief engineer of the defendants was held to be an officer of the defendants within this provision.

In *Dalziel v. Grand Trunk R. W. Co.*, 6 P. R. 307, the tie inspector of the western division of the defendants' railway was held not to be an officer of the defendants under the same provision.

In *McLean v. Great Western R. W. Co.*, 7 P. R. 358, an engine-driver and paymaster of the defendant company were held not to be officers.

In *Maitland v. Globe Printing Co.*, 9 P. R. 370, the assistant or sub-editor of the defendants was held to be an officer.

In *Ramsay v. Midland R.W. Co.*, 10 P. R. 48, a station-master was held to be an officer.

In *Goring v. London Mutual Fire Ins. Co.*, 10 P. R. 642, local agents of the defendant company were held to be officers.

In *Odell v. City of Ottawa*, 12 P. R. 446, a person appointed by the defendants to the charge of a traction engine in use by the defendants was held to be an officer.

If *Odell v. City of Ottawa* was well decided, the conductor in this case was an officer of the defendant company, for he was more an officer of the defendant company than the person in charge of the traction engine was an officer of the city of Ottawa.

It seems to me from the position the conductor of a train occupies in respect to the company and the position of command that he occupies in respect to the train, the powers he is entrusted with, and the duties he has to perform, and having regard to the object and purpose of this provision for discovery, that we must hold the conductor to be an officer of the defendants within the meaning of this provision.

I do not think that it can be laid down as a rule that a person who was liable to be examined for the purpose of discovery, and was not examined before the trial, but was examined at the trial as a witness, cannot be examined for the purpose of discovery after the trial, which has proved abortive either by the disagreement of the jury or by the granting of a new trial.

In such case the opposite party is entitled, in my opinion, to examine such person for the purpose of discovery; but the costs of the application for the order and of the order and proceedings thereon should in such case be borne by the party obtaining the order.

The appeal will, therefore, be allowed with costs, and the order will be varied in the manner above indicated.

FALCONBRIDGE, J.—I agree that the conductor is an “officer.” He is so by reason of the duty, charge, or trust conferred on him by the railway company, and he is none the less an officer because the company choose for reasons of their own not to engage him continuously, but to pay him by the trip.

I am not prepared to record my dissent from the opinions of my lord and of my brother Street on the other branch of the case, but I confess that, notwithstanding the wide language of the section, I entertain the gravest doubts whether it ever was the intention to permit the examination for discovery of a witness who has been already examined and cross-examined at a trial of the cause, and who then offered to make the fullest discovery.

STREET, J., agreed with ARMOUR, C. J.

Appeal allowed.

WATERHOUSE V. McVEIGH ET AL.

Arrest—Order for ca. sa.—Powers of County Court Judge—Power of Judge in Court to rescind order.

The Judge of a County Court has no power, either as such Judge or as local Judge of the High Court, to order the issue of a *ca. sa.* in an action in the High Court.

Cochrane Manufacturing Co. v. Lamon, 11 P. R. 351, followed.

A Judge of the High Court, sitting in “Single Court,” has power to set aside such an order.

[September 21, 1888.—*Armour*, C. J.]

MOTION by the defendant to set aside an order of the Judge of the County Court of the county of Simcoe, for the issue of a *ca. sa.* against the defendant John McVeigh, and to discharge the defendant from custody thereunder.

The action was in the High Court of Justice.

The motion was heard by Armour, C. J., in Court, on the 21st September, 1888.

Hewson and *Plaxton*, for the defendant, argued that the County Judge had no jurisdiction, either as such Judge or as local Judge of the High Court, to make the order in a High Court action; citing *Cochrane Manufacturing Co. v. Lamon*, 11 P. R. 351.

J. A. McCarthy, for the plaintiff, conceded that the local Judge had exceeded his powers, but objected that a single Judge, even when sitting in Court, had no power to set aside the order; citing *Disher v. Disher*, 12 P. R. 518; *Damer v. Busby*, 5 P. R. 356; *Robertson v. Coulton*, 9 P. R. 16; *Diamond v. Cartwright*, 22 C. P. 496; *McNab v. Oppenheimer*, 11 P. R. 214; *Re Doyle v. Henderson*, 12 P. R. 388. He also argued that the order in question was a mere nullity, and that the defendant being imprisoned under it, his remedy was by *habeas corpus*: citing *McNamara* on Nullities, p. 92; *Brown v. McMillan*, 7 M. & W. 196; *Smith v. Smith*, 11 P. R. 6.

[Argument was also heard on the question, whether the order should have been granted on the facts and circumstances shewn.]

ARMOUR, C. J.—Whether this order is a nullity or not it is clearly an order which the defendant is entitled to move to set aside, as he is in custody under it; and it is clear the Judge had no power to make this order. As to my jurisdiction to hear the motion, the cases cited only go the length of saying that a Judge in Chambers has no power to set aside an order in this way. The Court, however, has the power, and under the Judicature Act a single Judge sitting here or at the Assizes, is the High Court.

A Divisional Court has a very limited jurisdiction, and certainly would have no power in a case of this kind. Then, as we held in *Regina v. Beemer*, 15 O. R. 266, the Judges

of the Queen's Bench Division, sitting as a full Court, represent the old Court of Queen's Bench; but this is in criminal matters only. In civil causes the High Court sits when a Judge sits in Court; he may ask other Judges to sit with him, but that will not make him any more the Court.

I have jurisdiction to set aside the order, and I do so with costs, but such costs only are to be taxed as if the question of the County Judge's jurisdiction had been the only one before the Court.

END OF VOL. XII.

A DIGEST
OF
ALL THE REPORTED PRACTICE CASES
CONTAINED IN THIS VOLUME.

ABSCONDING DEBTOR.

See ATTACHMENT, 3.—REFeree, 3.

ABSCONDING DEBTORS ACT.

See ATTACHMENT, 3, 5.

ABSTRACT OF TITLE.

See VENDOR AND PURCHASER, 1, 3.

ACTION.

Action—Dismissal for non-prosecution—Motion by two defendants where there are others.]—A motion by two of the defendants to dismiss the action as against them for the plaintiff's default in not proceeding to trial was refused, where it appeared that one of the defendants, a necessary party, had for apparently sufficient reasons not been served with a writ of summons, while the action had proceeded against the other defendants, and as against them was ripe for trial.

Semble, that it is the duty of an applicant to apply to the plaintiff's solicitor for information as to the state of the cause in regard to the other defendants, before making such a motion. *Foley v. Lee et al*, 371.

See ATTACHMENT, 5.

ADMINISTRATION.

Administrator ad litem—Con. Rule 311.]—C. joined his wife in executing

a mortgage on her land to a company covenanting for payment, and then died intestate.

The company, being about to begin an action to realize their claim on the mortgage, desired to have C.'s estate represented for the purpose of claiming against it for any deficiency. No letters of administration having been taken out.

Held, that it was proper to appoint an administrator *ad litem* under Con. Rule 311. *Re Chambliss and Canada Life Assurance Company*, 649.

See INFANT, 3.

AFFIDAVIT.

Affidavits—Date of filing—Statement in notice of motion.]—Upon a motion to commit the defendant the Court refused to allow the plaintiffs to read affidavits filed upon a previous application, the date of their filing not having been stated in the notice of motion; and also refused to allow the plaintiffs to read an affidavit filed after the service of the notice. *Mackenzie et al. v. Carter*, 544.

ALIMONY.

Interim alimony—Disbursements—Separate estate—Status of married women.]—The peculiar practice of awarding interim alimony and disbursements in alimony suits is found

ded on the presumption that the husband has everything and the wife nothing, but when the contrary appears the presumption is done away; and the Court will, on applications for *interim* alimony, consider the question of the wife's ability to maintain herself out of separate estate or other sources of income, such as her earnings and allowances from her friends.

And where the wife had been living apart from her husband for five years, and had been supporting herself out of the rents of houses owned by her, and taking boarders, and through assistance rendered by members of her family, the Court refused to award *interim* alimony, but directed the husband to pay the prospective cash disbursements of the plaintiff's solicitors upon their undertaking to account.

Per BOYD, C. The change in the status of married women under recent legislation has no effect upon the law as to disbursements in actions for alimony, unless the wife is actually in receipt of such independent and separate means of support as will enable her to live and pay the costs of litigation without alimentation pending the action for alimony. *Knapp v. Knapp*, 105.

See VENUE, 3.

ALLOCATUR.

See COSTS, 27.

AMENDMENT.

See MANDAMUS, 2—NOTICE OF MOTION, 1—NOTICE OF TRIAL, 1—PARTIES, 4—WRIT OF SUMMONS—EJECTMENT—FORECLOSURE.

APPEAL.

1. *Appeal—Christmas vacation.*] Christmas vacation is not to be ex-

cluded in reckoning the eight days within which an appeal from the Master or Local Judge or Master in Chambers is to be brought on under Rule 427, O. J. A.

As such appeals are not heard in vacation, the time for appealing will be extended as a matter of course upon an *ex parte* application. *SNOWDEN v. HUNTINGTON*, 1.

2. *Appeal—Forum—Divisions of High Court—Sec. 25, O. J. A.*] Having regard to the provisions of sec. 25, O. J. A., the setting down of an appeal from a report in an action in the Chancery Division, to be heard at a sittings of Chambers in another Division, is a nullity. *RE CHRISTIE—CHRISTIE v. CHRISTIE ET AL.*, 15.

3. *Appeal—Divisional Court—Winding-up proceedings—45 Vic. ch. 23, sec. 78.*]—Pending proceedings under an order for the winding-up of a company under Vic. ch. 23 (D.), the Union Bank filed a petition praying that the liquidator might be ordered to deliver up certain lumber claimed by the bank. The petition came on to be heard before a Judge in Court, and was adjourned by him for the sake of convenience before the Judge holding the Port Arthur Assizes, who heard the evidence orally and pronounced judgment thereon.

Held, that the proceeding at Port Arthur was not the trial of an action and therefore and also having regard to the provisions of 45 Vic. ch. 23, sec. 78, (D.), that no appeal lay to the Divisional Court. *RE RAINY LAKE LUMBER COMPANY*, 27.

4. *Leave to appeal—Discretion—49 Vic. ch. 16. sec. 39 (O.)*]—Leave was given to appeal from the decision of Proudfoot, J., 12 O. R. 492, because of the importance of the question and of conflicting decisions.

An appeal now lies to a Divisional Court from a discretionary order, by virtue of 49 Vic. ch. 16, sec. 39 (O.), but that enactment has not altered the rule that a very strong case must be made out to induce the Court to reverse such an order. *POWELL v. PECK ET AL*, 34.

5. *Assessment—Appeal—Service of notice—Time—R.S.O. ch. 180, secs. 56.59.*—R. S. O. ch. 180, sec. 59, regulating appeals to the county Judge from the Court of Revision as to the assessment of property provides (sub.sec. 2) that the person appealing shall serve upon the clerk of the municipality within five days after the date limited by the act for closing the Court of Revision a written notice of his intention to appeal: (sub-sec. 3) that the Judge shall notify the clerk of the day he appoints for hearing appeals; and (sub-sec. 4) that the clerk shall thereupon give notice to all the parties appealed against. Sec. 56, sub-sec. 19, provides that all the duties of the Court of Revision shall be completed, and the rolls finally revised, before the 1st day of July in each year.

The Court of Revision heard the appeals in question on the 10th June, 1886, and rendered judgment on the following day. Notices of appeal dated the 15th June, 1886, were served upon the clerk on the 19th; the Court of Revision sat until the 5th July; on the 15th July the clerk notified the Judge that notice had been given of these appeals, and on the 26th July the Judge notified the clerk of the day that he had appointed for hearing the appeals, and the clerk notified the parties.

Held, that the limitation in sec. 59, sub-sec. 2, should be construed to mean that notice of appeal should not be served after the expiration of five days from the closing of the Court of

Revision; and also that the service in this case was within the five days, as the notices were in the hands of the clerk during the five days, and were acted upon by him; and further, that service prior to the expiry of the five days was good service. *Scott v. Town of Listowel—Livingston v. Town of Listowel*, 77.

6. *Leave to appeal—Time.*—Where leave of the Court is necessary for an appeal, application therefor should be made within three months from the judgment to be appealed from; but in a case where, although leave to appeal was necessary, none was obtained, and the appellant gave notice and filed his appeal bond, which was allowed without objection by the respondent and where the appeal presented a fairly arguable question of law, and no sittings had been lost by the delay;

Held, that such an equity was raised in the appellant's favor as entitled him to relief after the three months.

The rule laid down in *Sievwright v. Lees*, 9 P. R. 200, is the rule that should be acted upon in regard to extension of time.

Upon an interlocutory application the Court will not hear more than one counsel for any party. *Langdon v. Robertson*, 139.

7. *Practice—Appeal from judgment in favour of party appealing—Subsequently proceeding on judgment—Quashing appeal.*—If a party appeals from a judgment in his favour claiming relief inconsistent with that granted by the judgment appealed from, and, pending the appeal, proceeds upon the judgment and obtains the relief granted thereby, he will be deemed to have abandoned his appeal, which will be quashed at the instance of the re-

spondent on a motion for that purpose. *International Wrecking Co. v. Lobb*, 207.

8. *Leave to appeal—Extension of time—Excuse for delay—Requirement of justice.*—Two of the defendants (legatees) in an administration suit appealed from the report of a Master and thereby succeeded in charging the plaintiff, an executor, with their shares of a sum of \$4,000, which the executor had lost to the estate. The other defendants did not appeal, and as to them the report became absolute on the 24th March, 1887. Three of these defendants in September, 1887, after the success of their co-defendants' appeal was established, moved for leave to appeal and to extend the time, their excuse for the delay being, that they had supposed the appeal of their co-defendants would enure to their benefit.

Held, that justice required that the time for appeal should be extended, and these defendants let in to appeal, upon their placing the executor in as good a position as he would have occupied if they had appealed within the time allowed, notwithstanding that the \$4,000 was lost to the estate by an innocent mistake of the executor, that he had acted as he did by reason of the instructions given him by the testator, and his acting and taking advice according to the instructions had led directly to the mistake. *Langdon v. Robertson*, 12 P. R. 139, followed. *Birds v. Betty*, 6 Madd. 90, distinguished. *Re Gabourie—Casey v. Gabourie*, 252.

9. "*The Indian Act*," R. S. C. ch. 43, sec. 108—*Summary Convictions Act*, R. S. C. ch. 178—*Conviction—“Appeal brought”*—*Time.*—The words "appeal brought" in sec. 108

of the Indian Act, R. S. C. ch. 43, are satisfied by the giving of notice and perfecting the appeal by the giving of the security provided for by the Summary Convictions Act; and it is not necessary for an appellant from a conviction under that Act to bring his appeal to a hearing within the time limited by sec. 108. *In re Hunter v. Griffiths*, 7 P. R. 86, not followed.

Semble, merely giving notice of appeal within the thirty days would have satisfied the words of the statute. *Regina v. McGauley*, 259.

10. *Appeal—Court of Appeal—Order of Judge in Court—Interlocutory order.*—An order was made by a Judge sitting in Court, directing the execution by the defendants (mortgagees) of a reconveyance or discharge, directed by a previous judgment, or in default for a sequestration.

Held, that an appeal to the Court of Appeal lay without leave, whether the order was to be regarded as interlocutory or not.

Semble, per HAGARTY, C. J. O., and PATTERSON, J. A., that such an order is not in its nature interlocutory. *Bull v. North British Canadian Investment Company et al.* 284.

11. *Appeal—Waiver—Motion to extend time for complying with order appealed from.*—By an order of Boyd, C., 12 P. R. 275, a motion by the defendant to set aside a judgment for irregularity was refused, but the defendant was let in to defend upon paying into Court or securing \$700 within a month. The defendant moved for and obtained an order extending the time for paying the money in, and then appealed from the part of the order refusing to set aside the judgment for irregularity.

Held, that the defendant had waived his right of appeal from the order by obtaining an enlargement of the time for complying with it. *Pierce v. Palmer*, 308.

12. *Appeal—Injunction—Staying operation of—R. S. O. ch. 38, sec. 27.*]—*Held*, that the operation of an injunction awarded by a judgment of a Court below was stayed pending an appeal to this Court, after the perfecting of the security of an appeal, by virtue of R. S. O. ch. 38, sec. 27. *City of Toronto v. Toronto Street Railway Company*, 361.

13. *Appeal—Dismissal for delay—Extending time—Special circumstances—Judge in Chambers, powers and discretion of.*]—Motion to dismiss the defendants' appeal to this Court for want of prosecution. The judgment appealed from (12 O. R. 119) was pronounced on the 28th April, 1886, and notice of appeal was given within two weeks thereafter. Security was given at the end of June, but the draft appeal case was not sent to the plaintiff's solicitors till the 24th September following, and did not reach them till the 27th September. The period from that date till the 1st of March, 1887, was occupied by correspondence between the solicitors for the parties in an attempt to settle the appeal case, and at the end of that period it became apparent that there must be a motion to a Judge to settle the case. From the 1st of March, however, till the 28th of April, when a year had run from the pronouncing of judgment, nothing was done, and this motion was made on the 14th May, 1887. The reason given for the delay after the 1st March was that the appellants' solicitor thought it best to have the case settled by the Judge who tried the action, and that that Judge

did not during the time in question hold Chambers, he being away on circuit. It was shewn, however, on the other side that he was not continuously absent during this period.

Held, by PATTERSON, J. A., in Chambers, that no special circumstances were shown to justify an extension of the time, and that the appeal should be dismissed for want of prosecution.

Held, on appeal, by the Court, that the Judge in Chambers had power to make the order dismissing the appeal, and that nothing was shewn to warrant interference with his discretion. *Platt v. Grand Trunk Railway Company*, 380.

14. *Appeal from Master's ruling—Time—Reading depositions taken on former application—Estoppel.*]—An appeal from the ruling of a Master in the course of a reference should be brought on within a month from the date of the ruling, irrespective of the date of the certificate of such ruling.

In a mortgage action there was a reference to a Master for sale, etc. After sale and satisfaction of the plaintiff's claim out of the proceeds, a balance remained in Court, which R. G. applied to the Master to have paid out to her. Upon such application R. G. was examined before the Master, who refused the application. An order was afterwards made by a Judge referring to the Master to ascertain who was entitled to the fund, and to settle priorities. Upon such reference the Master ruled that the depositions of R. G. taken upon the former application could be read.

Held, reversing the decision of ROBERTSON, J., in Chambers, that the depositions could be read subject to the right of A., an opposing claimant of the fund to cross-examine R. G.

upon them ; R. G. to attend for such cross-examination upon payment of conduct money by A.

Held, also, that A. was estopped from appealing from the Master's ruling by reason of his not having objected to the evidence being referred to at a certain stage of the proceedings. *MacLennan v. Gray et al.*, 431.

15. *Evidence — Adducing additional evidence in Court of Appeal.*]—The defendants appealing from a Divisional Court, applied for leave to adduce further evidence in the Court of Appeal to corroborate that already taken upon a point which was argued before the Divisional Court, and decided adversely to the applicants. The application was refused.

Remarks on the reception of further evidence by appellate Courts. *Merchants Bank v. Lucas et al.*, 526.

See ARBITRATION AND AWARD, 2; 4—CONVICTION, 3—COSTS, 15, 18, 19, 27, 31—EXAMINATION, 13—FOREIGN JUDGMENT — MASTER IN CHAMBERS—VENUE, 5—INFANT, 4.

ARBITRATION AND AWARD.

1. *Arbitration—Costs—Taxation—Time and expenses in travelling—Amount of fees.*]—Upon an appeal from the taxation of costs of an arbitration, which the plaintiffs were ordered to pay :

Held, that items in respect of the loss of time in travelling and travelling expenses of an arbitrator were properly disallowed.

Held, also, that the amount to be allowed *per diem* to arbitrators and counsel was a matter peculiarly within the province of the taxing officer, and his decision should not be interfered with. *Re Hillyard et*

al. and the Royal Insurance Company, 285.

2. *Arbitrator—Disqualification—R. S. C. ch. 109, sec. 8, sub-sec. 28—“The Judge”—Divisional Court—Appeal—Certiorari.*]—A motion was made to Galt, J., under R. S. C. ch. 109, sec. 8, sub-sec. 28, to determine the validity of the cause of disqualification urged by land-owners against the arbitration appointed by a railway company under the provisions of the Act. The objection was, that the arbitrator was a ratepayer of a city largely interested in the railway company as a shareholder and creditor. He was not himself a shareholder, nor had he any personal interest in the matter, except as a resident of the city, in which he had no real estate, and was assessed on income only.

Held, by GALT, J., that the arbitrator was not disqualified.

Held, by the Chancery Divisional Court, that no appeal lay to a Divisional Court from the decision of the Judge acting under the statute.

Held, also, that the Divisional Court had no power to remove the proceedings by *certiorari*. *Re McQuillan and the Guelph Junction R. W. Co.*, 294.

3. *Arbitration — Extending time for making award—Death of party—No provision for appeal—Statute of Limitations.*]—Two persons submitted certain matters in dispute between them to the award of a barrister of character and standing. The submission provided that the death of either party should not operate as a revocation of the power and authority of the arbitrator ; there was no provision for an appeal from his award. The arbitrator allowed the time for making his award to run out before

entering on the reference. One of the parties had died since the submission, and the survivor now applied to the Court to enlarge the time. It appeared that the Statute of Limitations had so run since the submission as to bar portions of the applicant's claim.

Held, reversing the decision of ROSE, J., that the facts of the death and the absence of the right of appeal would not warrant the Court in refusing to enlarge the time, and that under the circumstances no injustice would be done by enlarging it. *Re Curry*, 437.

4. *Award—Appeal from—Time—Trinity Term.*—An award must be moved against within the term following its publication, or within the period which such term formerly occupied.

And when the term has been abolished, where an award was published on the 13th August, 1888, notice of appeal dated 7th September, 1888, but not served till 10th September, 1888, was,

Held, too late, and the appeal was dismissed. *Kean v. Edwards*, 625.

See Costs, 10, 13, 15, 24, 26.

ARREST.

1. *Arrest—Capias—Affidavit—"Intent to defeat."*—The use in the affidavit upon which an order for the issue of *ca. re.* was granted of the words "intent to defeat," instead of "intent to defraud," the latter being the words prescribed by R. S. O. (1877) ch. 67, sec. 5.

Held, not fatal to the arrest. *Laing v. Slingerland*, 366.

2. *Arrest—Ca. re.—Breach of promise—Statement of damage—Corroboration—Discharge of defendant.*]

—In an action for breach of promise of marriage the defendant was arrested under a *ca. re.*, the order for which was granted upon an affidavit which did not swear to any amount of damage. Upon a motion to discharge the defendant from the custody of his bail, he denied the promise of marriage, and the plaintiff filed no affidavit corroborating her own. The intent of the defendant to leave the country rested on alleged admissions made by the defendant to the plaintiff, which he denied, and he also brought forward a strong fact against his likelihood to abscond from the Province.

Held, that, under these circumstances, the defendant should be discharged, and the bail bond delivered up to be cancelled. *Donegan v. Short*, 589.

3. *Arrest—Judgment debtor—Order for examination—Appointment—Failure to attend—Committal—Substituted service of summons—Writ of attachment—Notice to debtor.*—Upon the return of a *habeas corpus*, an order was made by a Judge of the High Court for the discharge of the defendant from custody under a writ of attachment issued by order of a County Judge in an action in a County Court.

Held, (1) That an order to examine the defendant as a judgment debtor and an appointment under it together were equivalent to an order that the debtor should attend upon the day mentioned in the appointment, and when he obeyed the order by attending and offering to be examined, its force was spent and the power of the examiner under it at an end; to obtain a fresh appointment, a fresh order was necessary.

Jarvis v. Jones, 4 P. R. 341; *McGregor v. Small*, 5 P. R. 56, referred to.

(2) If an order for substituted service of a summons or notice of motion to commit can be made at all, even under the wide language of Con. Rule 467, it should not be made except in a case where no doubt exists that the notice has come to the knowledge of the person against whom the application is made.

(3) The order asked for by the summons, viz., for the committal of the defendant to the common goal was the appropriate punishment authorized by R. S. O. (1877) ch. 50, sec. 305, for disobedience to an order to attend for examination; and an order for the issue of a writ of attachment requiring the sheriff to hold the debtor in custody for an indefinite period was improper. At any rate a different order from that indicated in the summons should not have been made in the absence of the debtor.

(4) The writ of attachment under which the debtor was held was improperly issued without notice to him, as required by Con. Rule 879; and it made no difference that it was in lieu of one which had expired. *Re Chatham Harvester Co. v. Campbell*, 666.

4. *Arrest — Order for ca. sa. — Powers of County Court Judge — Power of Judge in Court to rescind order.* — The Judge of a County Court has no power, either as such Judge or as local Judge of the High Court, to order the issue of a *ca. sa.* in an action in the High Court.

Cochrane Manufacturing Co. v. Lamon, 11 P. R. 351, followed.

A Judge of the High Court, sitting in "Single Court," has power to set aside such an order. *Waterhouse v. McVeigh et al*, 676.

ASSESSMENT.

See APPEAL, 5.

ATTACHMENT.

1. *Attachment of debts—Claimant of moneys attached—Discretion of Judge—Rule 375, O. J. A.* — The plaintiff, after recovering judgment against the defendant, issued an attaching order upon moneys in the hands of the Canada Company, which were admittedly not the moneys of the latter, and which the plaintiff swore he was informed and believed belonged to the judgment debtor, but which was claimed by his son. There was nothing before the Judge of the County Court to support the assertion of the plaintiff, and the examination of the claimant taken at the instance of the plaintiff, failed to shew that there was any reason to believe that the claim was not well founded.

Held, that the Judge had under Rule 375 a discretion to direct or refuse to direct the trial of an issue, and that such discretion was properly exercised in refusing to so direct, and in rescinding the attaching order.

Semble, if the plaintiff had been able to suggest even a plausible ground for supposing that it was the money of the judgment debtor, or to cast a suspicion upon the *bona fides* of the claim of the son, it would have been the duty of the Judge to direct an issue, if the plaintiff desired it. *Johnson v. Moody*, 203.

2. *Attachment of debts—Order for costs.* — The person to receive payment under an order for payment of costs only is entitled to an order attaching debts due or accruing due to the person to pay.

Any doubt existing upon the English cases and the O. J. Act Rules, is cleared up by R. S. O. ch. 66, sec. 72, *Re Irvine, a Solicitor*, 297.

3. *Abscinding debtor—Successive applications for writ of attachment—Fact of prior application not disclosed—Cause of action—Particularity in stating.*—An application was made to a County Judge for an order to issue a writ of attachment under the Absconding Debtors' Act; the Judge did not finally determine against the application, but gave leave to renew it upon a further affidavit.

Held, that there was no reason why the application should not afterwards be made to another Judge.

Semle, also, that where a Judge refuses to grant an attachment or an order to hold to bail, successive applications may be made to successive Judges upon the same material, and an order granted by any one of them will be as valid as if it had been made by the first one; but in the case of a subsequent application upon the same or different material the Judge should always be informed of every previous application; this, however, more as a matter of propriety than of legal right, and an omission to do so would not be a ground for setting aside the order, if the material warranted the granting of it.

Held, also, that the same particularity in stating the cause of action is not required when a Judge has to make an order for a writ of attachment or to hold to bail, as was required in an affidavit to hold to bail when no order of a Judge was required, nor as when personal liberty is involved. *Bank of Hamilton v. Baine*, (2) 439.

4. *Attachment of debts—Dividends on insolvent estate.*—A judgment creditor seeking to garnish funds due to his judgment debtor by S., served an attaching order upon

the assignee of S. under an assignment for the benefit of creditors. At the time of the service the assignee had in his hands the greater part of the moneys belonging to the estate of S., but had not declared a dividend; and before he did so, but after the service of the attaching order, the judgment debtor assigned to G. the dividends coming to him from the estate of S.

Held, that the judgment creditor was entitled as against G. to the dividends from the insolvent estate based upon the amount that was in the hands of the assignee when the attaching order was made.

McCraney v. McLeod, 10 P. R. 539, explained and followed. *Parker v. Howe*, 351.

5. *Writ of attachment—Setting aside—Jurisdiction of County Court Judge in High Court action.*—The Judge of a County Court who orders the issue of a writ of attachment out of the High Court under sec. 2 of the absconding Debtors' Act, R. S. O. (1877) ch. 66, has no jurisdiction to entertain an application to set aside such writ. *Disher v. Disher*, 518.

6. *Receiver by way of equitable execution—Attachment of Debts—Salary not yet due.*—Judgment creditors on the 7th December, 1888, moved for a receiver by way of equitable execution to receive money which they alleged would be due to the judgment debtor on the 21st December, 1888, for salary as a school master.

Held, that if the debt was one which could be garnished, the judgment creditors should attach it; if it could not be garnished, it was because there was no debt at all. *Kincaid v. Kincaid*, 12 P. R. 462, dis-

tinguished. *Trust and Loan Co. v. Gorsline*, 654.

See LANDLORD AND TENANT, 1—
PROHIBITION, 2.

BAWDY HOUSE.

See CONVICTION, 1.

BREACH OF PROMISE OF MARRIAGE.

See ARREST, 2.

BY-LAW.

See NOTICE OF MOTION, 3.

CANADA TEMPERANCE ACT.

See CONVICTION, 2.

CAPIAS.

See ARREST, 1, 2, 4.

CASES.

Beddall v. Maitland, 17 Ch. D. 174, followed 399.

See COUNTER CLAIM, 3.

Belmonte v. Aynard, 4 C. P. D. 352, discussed 121.

See COSTS, 8.

Bickford v. Grand Junction R. W. Co., 1 S. C. R. 275, referred to... 607

See JUDGMENT, 12.

Bigham v. Warner, 10 P. R. 621, commented on 113.

See JURY, 3.

Birls v. Betty, 6 Madd. 90, distinguished 252.

See APPEAL, 8.

Bissett v. Jones, 32 Ch. D. 635, followed 492.

See JUDGMENT, 6.

Re Boustead and Warwick, 12 O. R. 491, followed 389.

See VENDOR AND PURCHASER, 1.

Bradbury, Exparte, 14 C. B. 15, followed 597.

See JUDGMENT DEBTOR, 3.

Bridges v. Longman, 24 Beav. 27, cited and followed 651.

See VENDOR AND PURCHASER, 3.

Canadian Bank of Commerce v. Middleton, 12 P. R. 121, Dictum of Master in Chas. in, not approved 490.

See COSTS, 21.

Re Carthew and re Paull, 27 Ch. D. 485, considered and explained 6.

See SOLICITOR AND CLIENT, 1.

Re Charles, 4 Ch. Chamb. R. 19, commented upon 389.

See VENDOR AND PURCHASER, 1.

Re Clark, 9 P. R. 337 distinguished 155.

See SOLICITOR AND CLIENT, 3.

Cochrane Manufacturing Co. v. Lamont, 11 P. R. 351, followed 676.

See ARREST, 3.

Coulson v. Spiers, 9 P. R. 49, followed 490.

See COSTS, 21.

Crooks v. Stroud, 10 P. R. 131,
distinguished, 464, discussed...597.

See JUDGMENT DEBTOR, 1, 3.

Cumberland v. Ridout, 3 P. R. 14,
followed 44.

See COSTS, 5.

Cushman v. Reid, 20 C. P. 147,
distinguished 367.

See PROHIBITION, 4.

Devereux v. Cairns, 11 P. R. 452,
discussed 185.

See PARTITION, 1.

Re Emma Silver Mining Co., L.
R. 10 Ch. 194, followed 458.

See EXAMINATION, 9.

Forfar v. Climie, 10 P. R. 90 spec-
ially referred to 367.

See PROHIBITION, 4.

Re Freeman et al. 1 Ch. Chamb. R.
102, considered and explained... 6.

See SOLICITOR AND CLIENT, 1.

Fritz v. Hobson, 14 Ch. D. 542,
followed 428.

See COSTS, 20.

Glass v. Frickleton, 10 Gr. 470,
followed 510.

See PARTIES, 4.

*Grierson v. Cheshire Lines Com-
mittee*, L. R. 19 Eq. 83, referred to
..... 408.

See RAILWAY, 1.

Re Harcourt, 32 Sol. J. 92, fol-
lowed 386.

See SOLICITOR AND CLIENT, 7.

Hall v. Laver, 1 Ha. 571, followed,
..... 288.

See COSTS, 14.

Hobbs v. Scott, 23 U. C. R. 619,
discussed 597.

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Hunt v. McArthur, 24, U. C. R.
254, no longer applicable 98.

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Re Hunter v. Griffiths, 7 P. R. 86,
not followed 259.

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Hyde v. Beardsley, 18 Q. B. D.
244, followed 44.

See COSTS, 5.

Jarvis v. Jones, 4 P. R. 341,
referred to 666.

See ARREST, 3.

Kendall v. Hamilton, 4 App. Cas.
513, followed 622.

See JURY, 7.

Kincaid v. Kincaid, 12 P. R. 462,
distinguished 485, 654.

See MANDAMUS 1, ATTACHMENT 6.

Kinsey v. Roche, 8 P. R. 515,
overruled 367.

See PROHIBITION, 4.

Re Knight v. Medora, 14 A. R. 112,
doubted but followed 367.

See PROHIBITION, 4.

Langdon v. Robertson, 12 P. R.
139, followed 252.

See APPEAL, 8.

Langtry v. Dumoulin, 10 P. R. 244,
approved 413.

See COSTS, 19.

Lemon v. Lemon, 6 P. R. 184,
discussed 597.

See JUDGMENT DEBTOR, 3.

Macdonald v. Piper, 10 P. R. 586,
distinguished 155.

See SOLICITOR AND CLIENT, 3.

Re Mead v. Creary, 31 C. P. 1,
doubted but followed 367.

See PROHIBITION, 4.

Metropolitan L. and S. Co. v. Mara,
8 P. R. 355 distinguished. 450, 464.

See PROHIBITION 6, JUDGMENT
DEBTOR 1.

Meyers v. Kendrick, 9 P. R. 366,
followed 565.

See EXAMINATION, 13.

Millar v. Cline, 12 P. R. 155,
distinguished 386.

See SOLICITOR AND CLIENT, 7.

Moir, ex-parte, 21 Ch. D. 61, fol-
lowed 597.

See JUDGMENT DEBTOR, 3.

Re Murdock, 9 P. R. 132, followed 2

See HABEAS CORPUS.

Munster v. Railton, 10 Q. B. D.
475, 11 Q. B. D. 435, 10 App. Cas.
680, referred to 646.

See PARTNERSHIP.

McCallum v. McCallum, 11 P. R.
179, distinguished 413.

See COSTS, 19.

McCraney v. McLeod, 10 P. R. 539,
explained and followed 351.

See ATTACHMENT, 4.

*McDougall v. Lindsay Paper Mill
Co.*, 20 U. C. L. J. N. S. 133, re-
ferred to 607.

See JUDGMENT, 12.

McGowan v. Middleton, 11 Q. B. D.
464, followed 399.

See COUNTER-CLAIM, 3.

McGregor v. Small, 5 P. R. 56,
referred to 666.

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McMahon v. Lavery, 12 P. R. 62.
disinguished 324.

See JURY, 5.

McNabb v. Oppenheimer, 11 P. R.
214, followed 38.

See MASTER IN CHAMBERS.

Re Northern Assam Tea Co., J. R.
5 Ch. App. 644, followed 298.

See COMPANY, 1.

Nurse v. Durnsford, 13 Ch. D.
764, followed 149.

See SOLICITOR AND CLIENT, 2.

Pfeiffer v. Midland R. W. Co., 18
Q. B. D. 243, followed 201.

See NOTICE OF MOTION, 1.

Quay v. Quay, 11 P. R. 258,
followed 249.

See COSTS, 11.

Reeder v. Bloom, 3 Bing. 9, fol-
lowed 611.

See COSTS, 30.

Regina v. French, 13 O. R. 80,
distinguished 142.

See CONVICTION, 2.

*Regina v. Judge of the Brompton
County Court, The*, 18 Q. B. D. 213,
followed 450.

See PROHIBITION, 6.

Regina v. Row, 14 C. P. 307, no
longer applicable 98.

See JUSTICE OF THE PEACE.

Reynolds v. Howell, L. R. 8 Q. B.
398 followed 149.

See SOLICITOR AND CLIENT, 2.

Runnacles v. Mesquita, 1 Q. B. D. 418, followed 64.

See JUDGMENT, 1.

— *v. Sexton*, 1 Dowl. 180, followed 611.

See COSTS, 30.

Shroder v. Myers, 34 W. R. 261, followed, 220, distinguished ... 223.

See VENUE, 1, 2.

Sieveuright v. Leys, 9 P. R. 200, approved 139.

See APPEAL, 6.

Re Smart infants, 12 P. R. 435, affirmed 635.

See INFANT, 4.

Smith v. Rooney, 12 U. C. R. 661, distinguished 506.

See JUDGMENT, 9.

Standard Bank v. Wills, 10 P. R. 159, not followed 492.

See JUDGMENT, 6.

Stanior v. Evans, W. N. 1886 p. 210, considered 38.

See MASTER IN CHAMBERS.

Stewart v. Sullivan, 11 P. R. 529, followed 42.

See COSTS, 4.

Temperance Colonization Society v. Evans, 12 P. R. 48, distinguished 324, followed 62.

See JURY, 5, 2.

Tomlinson v. Land and Finance Corporation, 14 Q. B. D. 539, discussed 121.

See COSTS, 8.

Ward v. Stallibras, L. R. 8 Ex. 175, followed 396.

See EXAMINATION, 7.

Watson v. Garratt, 3 P. R. 74, followed 44.

See COSTS, 5.

Westinghouse v. Midland R. W. Co., 48 L. T. Rep. N. S. 462, followed 86.

See PRODUCTION, 2.

Wheeler v. Le Marchant, 17 Ch. D. 675, followed 86.

See PRODUCTION, 2.

White v. Belfrey, 10 P. R. 64, commented upon 44.

See COSTS, 5.

Wiley v. Ledyard, 20 U. C. L. J. N. S. 142, referred to 607.

See JUDGMENT, 12.

Williams v. Crosling, 3 C. B. 956, followed 90.

See COSTS, 21.

Wilson v. Roberts, 11 P. R. 412, followed 447.

See COSTS, 17.

Wiltsie v. Ward, 8 A. R. 549, specially referred to 367.

See PROHIBITION, 4.

CAUSE OF ACTION.

See EJECTMENT.

CERTIFICATE OF TAXATION.

See COSTS, 19.

CERTIFICATE OF EXAMINER.

See EXAMINATION 15.

CERTIORARI.

See ARBITRATION, 2—CONVICTION, 2.

CHATTEL MORTGAGE.

See EXAMINATION, 13.

COMPANY.

1. *Company—Winding-up—Appointment of liquidator—Costs.*]—Upon a contest for the appointment of liquidator in a winding-up proceeding, it is desirable to follow the rules for guidance to be found in the English cases under the Winding-up Acts. The Court abstains from laying down any such rule as that the nominee of the petitioning creditors should have a preference. The Court will consider the condition of affairs to ascertain what parties are most interested in the due administration of the estate in liquidation, and other things being equal, will act upon their recommendation.

And where upon an application under the Dominion Act the creditors were those whose interests were most to be regarded, and the great bulk of them favoured the appointment of the sheriff of Lambton, and opposed the nominee of the petitioning creditors, and the sheriff resided in the county where the company's operations were carried on, and where all its books and assets were, was already *de facto* liquidator under voluntary proceedings taken pursuant to the Ontario Act, and was otherwise well qualified for the position, the Court appointed him liquidator.

The rule as to costs suggested in *Re Northern Assam Tea Co.*, L. R. 5 Ch. App. 644, followed. *Re Alpha Oil Co.*, 298.

2. *Company—Winding-up—Order of foreign Court—Defence—Res judicata.*]—In the course of proceedings taken in Scotland for winding-up the plaintiff's company, an order was made by a Scotch Court for delivery by the defendant, as one of the officers of the company, of certain books and papers said to be in his hands, and it was provided that in case of default the liquidator might proceed against the defendant who lived in Ontario, in any Court in Ontario having authority to compel delivery, and upon default this action was brought for that purpose.

Held, that there was and could be no final adjudication of rights by the order, for it could only be operative by enforcing it against the person of the defendant by attachment for disobedience, and such enforcement could not be of extra-territorial efficacy. There was no power in a winding-up proceeding to pronounce an order equivalent to a final judgment on the merits, based upon service of a person out of the jurisdiction of the Scottish Court.

And an order striking out the defence in the action on the ground that it was *res judicata* by the order of the Scottish Court was rescinded.

Semble, that the order of the Scottish Court should have been limited to such books and papers as were in the hands of the defendant at its date. *The British Canadian Lumbering and Timber Co. v. Grant*, 301.

CONTEMPT OF COURT.

See JUDGMENT DEBTOR, 1, 2.

CONTRIBUTION.

See COSTS, 1.

CONVICTION.

1. *Conviction—Keeping bawdy-house—Uncertainty—Place where offence is committed—Forfeiture of penalty—32 & 33 Vic. ch. 31, sec. 17—Costs.*]—Upon a motion on the return of a *habeas corpus* to discharge the prisoner, who was convicted of keeping a house of ill-fame ;

Held, that the conviction was bad on its face for uncertainty in not naming a place where the offence was committed.

Held, also, that it was defective because it did not contain an adjudication of forfeiture of the fine imposed.

The Act 32 & 33 Vic. ch. 31, sec. 17, provides that the magistrate may condemn the party accused to pay a fine not exceeding, with the costs in the case, \$100.

Held, that the meaning of this is, that the amount of the costs in the case shall be deducted from \$100, and that the balance or difference shall be the utmost limit of the fine ; and that the conviction in this case, being to pay the sum of \$100 without costs, was therefore bad. *Regina v. Cyr*, 24.

2. *Canada Temperance Act—Conviction—Adjournment to consider of judgment—32 & 33 Vic. ch. 31, sec. 46—Evidence—Certiorari.*]—Upon an information for an offence against the Canada Temperance Act a Police Magistrate heard all the evidence within the proper time, and at the close of the evidence announced in presence of the parties that judgment would be reserved for two weeks from that day—at which appointed time judgment was duly pronounced.

Held, that 32 & 33 Vic. ch. 31, sec 46 (D.), which is to be read into the Canada Temperance Act by vir-

tue of sec. 107, applies only to an adjournment of the hearing or the further hearing of the information or complaint, which is quite a distinct thing from the adjudication or determination of the charge after the hearing is completed. Justices are not obliged to fix the fine or punishment at the instant of conviction, but may take time either for the purpose of informing themselves as to the legal penalty or the amount proper to be imposed, or taking advice as to the law applicable to the case.

Notwithstanding the adjournment after the close of the hearing for fourteen days in order to consider of and give judgment, the Police Magistrate had jurisdiction, and the conduct of the proceedings was not even irregular.

Regina v. French, 13 O. R. 80, distinguished.

There was an amendment of the original information by changing the date of the offence from the 10th to the 23rd of February, and the parties agreed that the evidence taken should stand for the purposes of the amended charge instead of having a needless repetition of it.

Held, that this course was unobjectionable.

The defendant's application for a *certiorari* was refused, with costs. *Regina v. Hall*, 142.

3. *Intoxicating liquors—Conviction for selling to an Indian—Variance as to date between evidence and conviction—R. S. C. ch. 43, sec. 87—Findings of magistrate, when reviewable.*]—A summary conviction by the Police Magistrate of the county of Brant, for selling intoxicating liquor to an Indian in the township of Tuscarora, contrary to R. S. C. ch. 43 stated that the

offence was committed on the 29th September, 1887, but the information stated and the evidence disclosed that the offence was committed on the 27th September, 1887.

Held, that the date was not under the circumstances material, there being no suggestion that any wrong or injustice was caused by the mistake, and that sec. 87 of R. S. C. ch. 43, operated to cure this irregularity as also certain other irregularities complained of, the offence having been clearly proved, the Police Magistrate having express jurisdiction by sec. 96 of the Act, and the punishment imposed being within the power conferred upon him.

Held, also, that where the proceedings before a magistrate are removed under 29 & 30 Vic. ch. 45, sec. 5, the Judge is not to sit as a Court of Appeal from the findings of the magistrate upon the evidence; if any fact found by the magistrate is disputed, and he would have no jurisdiction had he not found that fact, then the evidence may be looked at to see whether there was anything to support his findings upon it; but if the jurisdiction to try the offence charged does not come in question as a part of the evidence, then the jurisdiction having attached, his finding is not reviewable as a rule except upon an appeal. *Regina v. Green*, 373.

4. *Criminal law—Conviction for vagrancy—Nature of offence.*—The Act, R. S. C. ch. 157, sec. 8, (f.), provides that “all persons who cause a disturbance in any street or highway by screaming, swearing, or singing, or by being drunk, or by impeding or incommoding peaceable passengers * * * are loose, idle, or disorderly persons within the meaning of this section.”

The defendant was convicted and committed for that he “unlawfully did cause a disturbance in a public street * * by being drunk, and then was a vagrant, loose, idle, and disorderly person within the meaning of the Act respecting vagrants.”

The evidence disclosed that the defendant was drunk, and that he was guilty of impeding and incommoding peaceable passengers, but it negatived his causing a disturbance in the street by being drunk.

Held, that no offence of the nature described in the conviction and commitment was committed by the defendant, and an order was made for his discharge. *Regina v. Daly*, 411.

5. *Warrant of commitment—Conviction—Variance—Motion to discharge prisoner—Enlargement—R. S. C. ch. 176, sec. 24.*—In determining, upon a motion to discharge a prisoner, whether a warrant of commitment is defective, the Court cannot, in view of the Summary Trials Act, R. S. C. ch. 176, go behind the conviction; and the proper course where there is a conviction sufficient in law, and a variance between the conviction and warrant of commitment, is to enlarge the motion so as to enable the magistrate to file a fresh warrant in conformity with the conviction.

And where the conviction alleged that the offence was committed in January, 1887, and the commitment January, 1888, the motion was enlarged accordingly. *Regina v. Lavin*, 642.

See INFORMATION—APPEAL, 9.

CORPORATION.

See PARTIES.

COSTS, AND SECURITY FOR COSTS.

1. *Costs—Creditor's action—Contribution—Appeal.*—In a creditor's action to set aside a chattel mortgage as preferential, the judgment at the trial declared that the mortgage was fraudulent and void as against the plaintiff and such other creditors of the defendant C. as might contribute to the expenses of the suit; and directed that the plaintiff should be paid his party and party costs by the defendant McC., and his additional costs as between solicitor and client out of the fund recovered for the creditors by setting aside the mortgage. The case was carried by the defendants to the Court of appeal and the Supreme Court of Canada, and the judgment at the trial was finally affirmed in all respects, but the additional costs as between solicitor and client were not given by the Court of appeal or the Supreme Court.

Held, that the plaintiff's expenses in saving the fund were not limited to party and party costs, but extended to those incurred as between solicitor and client to the end of the proceedings in the Supreme Court; that the plaintiff had a right to object to the other creditors coming in to share in the fund until they had contributed to these extra costs; and, in order to avoid circuitry, it was directed that they should be taxed and paid out of the fund. *Macdonald v. McCall et al.*, 9.

2. *Costs of the day.*—Under an order made at the Assizes postponing the trial upon payment of "the costs of the day," only one counsel fee of \$10 is taxable. *Hogg v. Crabbe*, 14.

3. *Costs, security for against one of several plaintiffs—Joinder of plaintiff—Causes of action.*—The rule that security for costs should not be ordered where it could be only against one of several plaintiffs does not now universally govern, since the law as to joinder of plaintiffs has been changed by Rule 89, O. J. A.

Quære, whether the rule was ever applicable to the ordering of security for costs against an insolvent plaintiff suing for the benefit of another person.

And where one plaintiff was suing to enforce a mechanic's lien against certain land, and the other, an insolvent, suing on another's behalf to set aside a sale of the same land, security for costs was ordered against the latter plaintiff alone. *Irving et al. v. Clark et al.*, 29.

4. *Interlocutory costs—Staying proceedings—Trespass.*—Where the plaintiff is acting in good faith his action should not be stayed for non-payment of interlocutory costs; and an action of trespass is in that respect in no way different from any other.

Stewart v. Sullivan, 11 P. R. 529, followed. *Wright v. Wright*, 42.

5. *Costs, scale of—"Costs to abide the event"—Trial—Rule 511—Set-off.*—The parties by consent allowed a verdict for the plaintiff for \$1 to be taken before the Judge at the Assizes, to be altered according to the result of a reference agreed upon, and also agreed that the costs should abide the event. The action was for damages for negligence, and the award was in favour of the plaintiff for \$85. A question having arisen as to the scale of costs;

Held, following *Watson v. Garrett*,

3 P. R. 74, and *Hyde v. Beardsley*, 18 Q. B. D. 244, that "costs to abide the event" does not mean that the plaintiff, if successful, shall necessarily have full costs, but that he shall have such costs as, under the statutes and rules of Court, a plaintiff recovering the amount that he recovers by the event is entitled to.

Held, also, following *Cumberland v. Ridout*, 3 P. R. 14, that the final judgment by means of the reference was to be regarded as obtained without a trial, and the costs therefore depended upon Rule 511, under which the taxing officer was directed to proceed.

There should be no set-off of costs; such a result is not contemplated by Rule 511, and it is not a fair construction to incorporate with it the provisions of R. S. O. ch. 50, sec. 346, that section being restricted to a case where there is a trial.

White v. Belfry, 10 P. R. 64, commented upon. *Andrews v. City of London*, 44.

6. *Costs, scale of—Rule 218—Money paid into Court with defence.*—The plaintiff in an action in the High Court of Justice claimed \$296.14, the balance of an account of \$896 for rent and goods sold and delivered.

The defendants in their statement of defence admitted a liability of \$170.30, but claimed a credit of \$81.14, leaving a balance due of \$89.16, which they brought into Court with their defence.

The plaintiff served notice under Rule 218, accepting the amount paid in full of the claim, and proceeded to tax his costs. Upon taxation a question arose as to the scale of costs.

Held, that the provision in Rule 218, that the plaintiff may tax his

costs, does not give him costs according to any higher scale than if he had entered judgment for the sum which he received out of Court; the costs should therefore be on the County Court scale, as the whole amount of the account was over \$300, and the amount admitted by the defendant was \$170.30. *Chick v. Toronto Electric Light Co.*, 58.

7. *Costs—Executor—Taxation—Moderation.*—Bills of costs for services rendered to an estate after a testator's death, down to the date of an order for the administration of the estate, were paid by the executor after the order and pending administration proceedings.

Held, that there could be no taxation of the bills as against the executor at the instance of creditors, but that the bills should be moderated. So far as the solicitors were concerned the payment by the executor was to be regarded as payment of the bills, and to obtain a taxation after payment a case would have to be made against the solicitors.

Practically the moderation might be so conducted, if warranted by special circumstances, as to differ but little from a taxation. *Re Hague, Traders Bank v. Murray*, 119.

8. *Costs, security for—Issue arising out of garnishment proceedings—Interpleader issue.*—Where one of the parties to an issue arising out of garnishment proceedings is out of the jurisdiction, there is power under Rule 375 to order security for costs: but

Seem, owing to there being no rule in Ontario similar to the English Rule 864 of 1883, there is no power to make such an order in an interpleader issue.

Belmonte v. Aynard, 4 C. P. D.

352, and *Tomlinson v. Land and Finance Corporation*, 14 Q. B. D. 539, discussed. *Canadian Bank of Commerce v. Middleton*, 121.

9. *Costs—Set-off—Rule 436—Solicitor's lien.*—Under Rule 436 a discretion is allowed as to whether or not there shall be a set-off of costs in the same action where costs are awarded to and against the parties; equitable considerations are allowed to enter into the disposal of the contention, and there is no strict right in the matter.

A direction to set-off costs was properly refused under the following circumstances:—The plaintiff succeeded at the trial of an action for specific performance of a contract for the sale of land, and was given costs up to the trial; on reference to a Master he failed to shew title, and was ordered to pay the defendant his costs subsequent to the trial, and to repay \$500 of the purchase money which had been paid by the defendant; the defendant's solicitor asserted a lien upon the sum due by the plaintiff for costs, which could be recovered upon the bond given by him as security for costs, whereas the \$500 could not be recovered against the plaintiff who was worthless. *McCarthy v. Cooper et al.*, 125.

10. *Costs—County Court scale—Counsel fees—Arbitration.*—In taxing the costs of an arbitration upon the County Court scale, no larger fee for attendance of counsel before the arbitrators than \$25 can be allowed, even though the attendance is for several days. *Re Montague and the Township of Aldborough*, 141.

11. *Costs—Taxation—Local taxing officer—Rule 447.*—Rule 447 applies to a taxation of costs con-

ducted by a local taxing officer under the powers given him by 48 Vic. ch. 13, sec. 22 (O.), and an appeal from such taxation does not lie unless objections are carried in before the officer, as required by that rule.

Quay v. Quay, 11 P. R. 258, followed. *Snowden v. Huntington et al.*, 248.

12. *Costs—Taxation—Appeal—Copies of opinions of Judges—Objections.*—Upon an appeal to a Judge in Chambers from the taxation of costs by a local taxing officer, where the bill was referred to one of the taxing officers at Toronto as upon a revision:

Held, that there should be no costs of the appeal and revision unless substantially entire success was with one party or the other.

Charges for procuring copies of opinions of Judges in another action for the instruction of counsel should not be taxed as between party and party.

An appeal should not be allowed as to any item not included in the objections put in to the taxation. *Platt v. The Grand Trunk R. W. Co.*, 273.

13. *Costs—Taxation—Appeal—Arbitration—Witnesses—Subpœna—R. S. C. ch. 109, sec. 8, sub-secs. 22, 23.*—By the Dominion Railway Act, R. S. C. ch. 109, sec. 8, sub-sec. 22, the costs of an arbitration as to the value of land expropriated for a railway may be taxed by the Judge. The Judge in this case, by an order not appealed against, referred the taxation to a taxing officer.

Held, that the question whether the Judge had power to delegate the taxation could not be raised, and that an appeal lay from the taxing officer to the Judge.

By sub-sec. 23 of sec. 8 of the Act, "the arbitrators * * may examine on oath * * the parties, or such witnesses as may voluntarily appear before them." In this case subpœnas were issued, and witnesses attended upon them and were examined.

Held, that there was no power to compel the attendance of witnesses, and those who attended must have done so voluntarily; there was no power, therefore, to tax the subpœnas as such, but as they operated as notices, the proper costs of notices should be allowed, and also the costs of the attendance of the witnesses. *Re McRae and the Ontario and Quebec R. W. Co.*, 282.

14. *Costs—Solicitor appointed by Master—G. O. Chy. 218.*—During a reference in an administration suit the Master appointed the solicitor for one of the unsecured creditors of the estate in question to represent the general body of unsecured creditors. The Imperial Bank were unsecured creditors of the estate; they sent in a claim to the administrator in answer to the statutory advertisement for creditors, but did not prove their claim before the Master. The nomination of the one solicitor for the unsecured creditors was an *ex parte* proceeding, of which the bank were not notified till a year afterwards.

Held, that, in the absence of contract or of an order of the Master made under conditions contemplated by G. O. Chy. 218, the solicitor could not recover from the Imperial Bank any portion of the costs incurred on behalf of the unsecured creditors in contesting the claims of the secured creditors.

Held, also, that the doctrine of ratification by silence or inaction did not apply to a case like this.

Hall v. Laver, 1 Ha. 571, followed. *Re Monteith—Merchants Bank v. Monteith*, 288.

15. *Costs—Taxation—Appeal—Arbitration—Witnesses—Subpœnas R. S. C.—ch. 109, sec. 8, sub-secs. 22, 23—Divisional Court.*—The decision of PROUDFOOT, J., 12 P. R. 282, upon appeal from taxation of costs of an arbitration under R. S. C. ch. 109, sec. 8, affirmed.

Quære, whether "the Judge" named in sub-sec. 22, could delegate the taxation of costs.

An appeal from the taxation of costs where the amount in question is less than \$40, should not be brought before a Divisional Court. *Re McRae and the Ontario and Quebec R. W. Co.*, 327.

16. *Costs, security for—Action by married woman—Nominal plaintiff.*—Action to remove a cloud from the title to certain land of the plaintiff, a married woman, whose husband when in embarrassed circumstances had bought the land and taken a conveyance in her name. The plaintiff had no separate estate, and her husband was not a person of substance. There was no trust between the husband and wife.

Held, PROUDFOOT, J., dissenting, that though suing alone and without separate estate, a married woman is not required to give security for costs. The only person who could be plaintiff on the title was the wife, and her husband could not be joined as a necessary or even a proper party. This case did not come within the class of cases where a nominal insolvent plaintiff is put forward, while the substantial litigant keeps in the background in order to avoid liability for costs; and an order for security for costs was set aside. *McKay v. Baker*, 341.

17. *Costs—Certificate for—Action for libel—Nominal damages—Cause for depriving successful party of costs.*—Where, in an action for libel, the plaintiff obtained a verdict for twenty cents damages.

Held, that no certificate or order for full costs was necessary, and that the plaintiff could be deprived of such costs for good cause only.

Wilson v. Roberts, 11 P. R. 412, followed.

The Court cannot look behind or beyond the finding of the jury as to the right of a party to recover a verdict, and therefore the cause here alleged for depriving the plaintiff of costs, viz., that he was really not entitled to recover, as shewn by the result of a trial of substantially the same issues before another forum, could not be regarded. *Wellbanks v. Conger*, (2) 447.

18. *Security for costs—Appeal to Supreme Court of Canada—Amount—R. S. C. ch. 135, sec. 46.*—The Court has no discretion to increase the amount of security on appeal to the Supreme Court of Canada, fixed by R. S. C. ch. 135, sec. 46, at \$500, because of the number of respondents. *Archer v. Severn*, 472.

19. *Costs—Taxation—Solicitor's lien on fund—Locus standi of attaching creditor—Solicitor's negligence—Discretion of taxing officer—Certificate of taxation.*—G, a judgment creditor of W. A. C., garnished a fund recovered by J. W. C., suing as the assignee of W. A. C., G. disputed the validity of the assignment from W. A. C. to J. W. C., and an issue was directed to be tried between G. and J. W. C., as to the portion of the fund which would remain after satisfying the claim of

the solicitor of J. W. C., who had a lien upon the fund for his costs incurred in the recovery of it. Upon appeal from the taxation of these costs, before the trial of the issue;

Held, that G. had the right to be represented upon the taxation and appeal, as in one event he had an interest in the reduction of the solicitor's bill, and there could not be two taxations, one as against J. W. C., and the other as against G. if he succeeded in the issue.

The Court refused to interfere with the discretion of the taxing officer in allowing certain costs to the solicitor of proceedings which had been set aside in the action as irregular, and as to which G. alleged negligence and want of skill.

An informal certificate of taxation was written at the end of the bill of costs, shewing that it was taxed at so much, initialled by the taxing officer, and marked "filed" in his office.

Held, that this was not a sufficient filing of a certificate of taxation for the purposes of appeal, to satisfy the rule laid down in *Langtry v. Dumoulin*, 10 P. R. 244.

McCallum v. McCallum, 11 P. R. 179, distinguished. *Gall & Co. v. Collins*, 413.

20. *Costs—Omission to order at trial—Subsequent order—Rule 338.*—The trial Judge reserved judgment and afterwards delivered a written judgment in the plaintiff's favour, but inadvertently omitted to make any order as to costs.

Held, that the case came within Rule 338, and that the Judge had power, even after an appeal to a Divisional Court which left his judgment undisturbed, to make an order as to costs.

Fritz v. Hobson, 14 Ch. D. 542, followed. *Hardy v. Pickard*, 428.

21. *Security for costs — Interpleader issue — Local Judge, jurisdiction of.*]—A local Judge in whose county the proceedings in an action out of which an interpleader arose were carried on, and who himself made the interpleader order, has power to make an interlocutory order in the issue thereby directed.

Coulson v. Spiers, 9 P. R. 49, followed.

A party to an interpleader issue may be ordered to give security for costs.

The dictum of the Master in Chambers in *Canadian Bank of Commerce v. Middleton*, 12 P. R. 121, not approved.

Williams v. Crosling, 3 C. B. 956, followed. *Swain v. Stoddart*, 490.

22. *Costs — Motion for prohibition.*]—By R. S. O. (1877) ch. 52, sec. 2, a successful party on an application for a writ of prohibition is entitled to and should be awarded costs unless the Court in the proper exercise of a wise discretion can see good cause for depriving such party of them; and such party should not be deprived of costs unless there appear impropriety of conduct which induced the litigation, or impropriety in the conduct thereof.

Under the circumstances of this case, reported ante p. 450, the defendant was allowed costs of a successful motion for prohibition to a Division Court. *Re McLeod v. Emigh* (2), 503.

23. *Costs "as between solicitor and client" — Mistake — Effect of accepted offer — Release.*]—A party cannot be released from an offer, deliberately made to and accepted by the opposite party, on the ground that his offer turns out to have some different effect from what he supposed it would have.

Costs "as between solicitor and client" in an action include such costs as a solicitor can tax against a resisting client under the general retainer to prosecute or defend the action. *Cousineau v. City of London Fire Ins. Co.*, 512.

24. *Costs — Covenant for renewal lease, construction of — Costs of lease — Costs of reference and award — Costs of action for arbitrators' fees.*]—It was provided in a lease that if the lessee should desire a renewal for a further term and give a defined notice, containing the name of an arbitrator, the lessors, at the expense of the lessee, should execute a new lease at such increased yearly rent as might be determined by the award of three indifferent arbitrators, or a majority of them.

Held, that the costs of the law were provided for both by law and by the above clause, and must be borne by the lessee; but that the costs of the arbitration were not provided for by the clause, and each party must bear his own costs of the reference, one-half of the arbitrators' fees, for which the action was brought, and one-half of the plaintiffs' costs of the action. *Smith et al. v. Fleming et al.*, 520, 657.

25. *Costs, scale of — Setting off costs — R. S. O. (1877) ch. 50, sec. 347, sub-sec. 3.*]—In an action for damages for breach of a contract, the jury awarded the plaintiffs \$68.50, and the trial Judge entered judgment for that amount, and certified to entitle the plaintiff to costs on the Division Court scale, and to prevent the defendant from setting off High Court costs.

On appeal, a Divisional Court varied the order as to costs so as to give the plaintiff such costs only as

he would have recovered under R. S. O. (1877) ch. 50, sec. 347, sub-sec. 3, where the Judge at the trial did not certify. *Livernois v. Bailey*, 535.

26. *Costs—Increased counsel fees—Arbitration—Powers of taxing officer.*—Item 153 of Tariff A, Con. Rules of Practice, should be read as part of item 164; and the taxing officers at Toronto have authority to consider the question of increased counsel fees in the case of an arbitration where there is no cause in Court and a reference to a local officer to tax costs has been made under R. S. O. (1887), ch. 53, sec. 24. *Re McKeen and Township of South Gower*, 553.

27. *Costs—Taxation—Appeal—Local taxing officers—Form of certificate or allocatur.*—There is no need for local officers when taxing costs for the purpose of completing a judgment and issuing execution thereon (which they as local officers may also do) to preface the issuing of an execution by a formal certificate to themselves of what they have done upon the taxation. They signify clearly and sufficiently the completion of the taxation and the full discharge of their functions as taxing officers when they add up results, ascertain the correct amount payable, note the bill of costs as taxed at such a sum, with the date, and verify the whole by their signature, which is a sufficient certificate or allocatur to shew that the taxation is at an end. They have no power to alter what they have allowed or disallowed after this, except as to clerical errors, and they are then *functi officii*.

Any objections to the taxation must be carried in in writing before the signature of the officer is affixed.

Remarks upon the former practice at law and equity as to allocaturs and certificates of taxation. *Cuerrier et ux. v. White*, 571.

28. *Costs, security for—Garnishing matter—Evidence of residence out of jurisdiction.*—In an issue between a judgment creditor and a garnishee as to the liability of the latter to the judgment debtor.

Held, that there was power to order security for costs; but

Held, that the refusal of the solicitor for the judgment creditor to disclose his client's place of abode was not sufficient evidence of his living out of the jurisdiction to support such an order. *Edwards v. Edwards*, 583.

29. *Costs—unnecessary counter-claim.*—To an action on a building contract the defendant set up the defence that the work was incompletely and unskilfully done, and counter-claimed for damages by reason thereof. The Master to whom the action was referred found that \$177 should be deducted for unskilful and incomplete work from the amount claimed by the plaintiff, and that the defendant had suffered damage to the extent of \$177.

Held, that the questions raised by the defendant might have been raised in a similar action before the Judicature Act, and that he was not entitled to have the costs dealt with as if what he had set up was properly a counter-claim. *Cutler v. Morse*, 594.

30. *Costs—Party and party—Status of solicitor.*—The defendant in this action was represented by a firm, purporting to be a firm of solicitors, one of the members, however, not being a duly admitted or

certificated solicitor. The plaintiff objected to the costs awarded the defendant in the action being taxed to him.

Held, that in the absence of proof that these costs had not been paid by the defendant to the persons who acted as his solicitors, the objection could not prevail; nor could it even if that proof had been given.

Reeder v. Bloom, 3 Bing. 9; — *v. Sexton*, 1 Dowl. 180, followed. *Scott v. Daly*, 610.

31. *Solicitor and Client—Costs, taxation of—Disallowance of costs of unnecessary proceedings—Interest—Appeal—Time.*]—The mere non-communication by a solicitor to his client of an offer of settlement does not prove that proceedings after the offer were unnecessary, and that the costs of them should be disallowed under Con. Rule 215, unless it is shewn that the offer was an advantageous one, the acceptance of which the solicitor ought to have advised, and it can be fairly inferred that he refrained from communicating it and advising its acceptance merely for the purpose of putting costs into his own pocket, and without regard to the interests of his client.

A taxing officer has no authority to charge a solicitor with interest upon moneys in his hands belonging to his client.

The time for appealing from a taxation of costs begins to run from the date of the certificate of taxation, not from the date of each ruling in the course of taxation. *Re O'Donohoe, a Solicitor*, 612.

32. *Costs—Jurisdiction of County Court—Title to land—Pleading.*]—The statement of claim alleged that the defendant was a monthly tenant of the plaintiff's land, and that the

plaintiff on a certain day terminated the tenancy by notice, and claimed damages for injuries to the demised premises. The statement of defence denied the allegation that the defendant was the tenant of the plaintiff.

Held, that the title was put in issue by such denial, and as a County Court would therefore have had no jurisdiction, the costs should be on the scale of the High Court, although the plaintiff recovered only \$75.

Held, also, that the question whether the title was in issue must be determined according to the pleadings, and not according to what took place on the trial or reference. *Wor-man v. Brady*, 618.

33. *Costs out of estate—Interest upon from taxation.*]—Costs of all parties of an action for the construction of a will were ordered to be paid out of the estate of the testator, and were taxed in 1883, but there were no funds available for their payment until 1888.

Held, that interest upon these costs could not be allowed out of the estate. *Archer et al. v. Severn et al.* 648.

See ARBITRATION, 1—COUNTER-CLAIM, 3—HABEAS CORPUS—INTERPLEADER, 2, 5—JUDGMENT DEBTOR, 2—LANDLORD AND TENANT, 2—MANDAMUS, 1—PARTITION, 2—PAYMENT INTO COURT—RECEIVER—SOLICITOR AND CLIENT, 1, 2, 3, 5, 7, 8—WINDING-UP PROCEEDINGS, 1—ATTACHMENT, 2—EXAMINATION, 16.

COSTS AS BETWEEN SOLICITOR AND CLIENT.

See COSTS, 23.

COUNSEL.

See APPEAL, 6—SOLICITOR AND CLIENT, 6.

COUNSEL FEE.

See COSTS, 2, 10, 26.

COUNTER-CLAIM.

1. *Will—Pleading—Counter-claim Fraud—Particulars.*—The defendant contested the validity of a will propounded by the plaintiff, and also propounded two earlier wills, under which, in the event of the last in date being invalidated he claimed.

Held, that this was a proper subject of counter-claim.

Held, also, that a general defence of fraud was admissible in such a case; but under that defence the defendant was required to give particulars immediately after the examination of the plaintiff. *Appleman v. Appleman* 138.

2. *Counter-claim—Slander—Action on promissory note.*—To an action on a promissory note the defendant L., the endorser, pleaded that by an arrangement made with the plaintiffs, who had discounted the note, it was to be renewed from time to time, and paid out of the proceeds of a certain agency business, in which the defendant O., the maker of the note, and the defendant L. were engaged as partners; that the defendant O. had absconded, and that afterwards the plaintiffs had, by libel and slander of the defendant L., prevented him from securing the continuance of the agency business for himself, whereby he was unable to carry out the arrangement; and he also pleaded a

counter-claim against the plaintiffs for the alleged libel and slander.

The Court, [ROSE J., dissenting.] Struck out the counter-claim, upon an application under Rule 127, (b), O. J. A.

Per CAMERON, C. J.—There is a wide range of discretion under Rules 127 (b), 168, and 178. In actions where malice is an essential element and the damages are sentimental without a legal rule to guide in their measurement, there is much more injury likely to arise to the cause of justice by allowing such a counter-claim than can possibly spring from the defendants being forced to bring an independent action.

Per ROSE, J.—The charge of libel arises out of the circumstances giving rise to the claim and defence. If the facts set up by L. do not constitute a valid answer in law to the claim, the plaintiffs may recover judgment against him, when peradventure he is in law and justice entitled to damages against them, exceeding the amount of such claim; but if the facts constitute a defence to the claim, they must be allowed to be shewn in evidence, and no good will be achieved by not allowing the counter-claim to stand. *Central Bank of Canada v. Osborne et al.*, 160.

3. *Counter-claim — Costs — Construction of order.*—Although for some purposes a claim and counter-claim form but one action yet the costs of the counter-claim, are to be taxed separately from the costs of the action, a counter-claim being for the purposes of taxation to be treated as a cross-action

McGowan v. Middleton, 11 Q. B. D. 464, and *Beddall v. Maitland*, 17 Ch. D. 174, followed.

And where the order of a Divisional Court varied the judgment at

the trial by directing that the counter-claim should be struck out and not dismissed, and should be disposed of in a separate action, and also directed that the defendants should pay into Court the amount of the costs of the action, but was silent as to the costs of the counter-claim.

Held, that the rights of the parties must be governed by this order, and not by anything that preceded it, and that under it the plaintiffs were not extitled to tax the costs of the counter-claim. *Emerson v. Gearin*, 399.

4. *Counter-claim—Issue—Close of pleadings—Notice of trial*]—A counter-claim must be a defence in the action in which it is pleaded, and it is as much a part of the defence as any of the other pleas. And therefore where the plaintiff took issue on the defence, not mentioning the counter-claim.

Held, that the pleadings were closed, and a notice of trial served thereafter was regular. *Macara v. Snow*, 616.

5. *Counter-claim—Defence—Reply—Jurisdiction of Court—Foreign defendant—Assets in jurisdiction—Con. Rule 271.*]—A counter-claiming defendant is not a plaintiff in an action; nor is a counter-claim an action.

The defence of the plaintiff to a counter-claim is technically the plaintiff's reply, notwithstanding Con. Rule 379, and there can, without leave, be no further pleading by the defendant but a joinder of issue.

To a counter-claim against the plaintiff, who lived out of Ontario, seeking the recovery of a debt contracted out of Ontario, the plaintiff pleaded that the Court had no jurisdiction, and the defendant replied,

without obtaining leave, that the plaintiff had assets in Ontario to the value of \$200.

Held, that this reply, even if leave were obtained, was bad, because subsec. (e.) of Rule 45, O. J. A., has not been incorporated in the Consolidated Rules. See Con. Rule 271. *Irwin & Co. v. Brown*, 639.

CREDITORS' RELIEF ACT, 1880.

Creditors' Relief Act—Mortgage action—Execution creditors against lands—Ratable distribution of proceeds of sale—Foreclosure judgment.]—The Creditors' Relief Act applies to execution creditors against lands in question in a mortgage action for foreclosure or sale, and all such creditors must share ratably in the proceeds of sale, after payment of the mortgage debt, interest, and costs.

Semble, in the case of foreclosure, the old form of decree giving execution creditors as subsequent incumbrancers liberty to redeem according to their priorities, is no longer applicable.—*Harvey v. McNeil*, 362.

See INTERPLEADER, 2.

DAMAGES.

See LANDLORD AND TENANT, 1.

DEMURRER.

See JURY 3—PLEADING, 2.

DISCOVERY.

See EXAMINATION—PRODUCTION.

DISCRETION.

See APPEAL, 4, 13—ARBITRATION,
1—ATTACHMENT, 1—COSTS, 19—
COUNTERCLAIM, 2—EXAMINATION, 5
—FOREIGN COMMISSION—JURY, 2, 4,
—MANDAMUS, 2.

DISMISSAL FOR NON-PROSECUTION.

See ACTION—APPEAL, 13—SOLICITOR AND CLIENT, 2.

DIVISIONAL COURT.

See APPEAL, 3, 4—ARBITRATION,
2—COSTS, 15.

DIVISIONS OF HIGH COURT.

See APPEAL, 2—TRIAL.

DOWER.

See PARTITION, 1.

EJECTMENT.

Action for recovery of land—Joinder of other causes of action—Con. Rule 341.]—The plaintiff, without leave, joined other causes of action in an action for the recovery of land, contrary to Con Rule 341.

Upon a motion by the defendant to set aside the writ of summons, the Master in Chambers made an order for the amendment of the writ by striking out the portion of the indorsement containing the other claims, upon payment of costs.

ROBERTSON, J., on appeal, upheld the Master's order. *White v. Ramsay*, 626.

See WRIT OF ASSISTANCE.

ESTOPPEL.

See APPEAL, 14.

EVIDENCE.

See APPEAL, 14, 15—MORTGAGOR AND MORTGAGEE, VENUE, 4.

EXECUTION CREDITOR.

See CREDITORS' RELIEF ACT, 1880—FOREIGN COMMISSION.

EXAMINATION.

1. *Discovery—Foreign party—Examination and production—Staying action.*]—When a party to an action who lives in a foreign country comes within the jurisdiction, service upon him of an appointment and subpoena, as in the case of resident litigants, is sufficient to compel his attendance: and it lies upon the party so served to object at the time to the payment for conduct money.

It is unreasonable that books in constant use should be required to be brought from without the jurisdiction for the purpose of an examination, unless the examiner in the course of the examination rules that they are necessary.

Upon failure of the plaintiff to attend for examination, the action should not be stayed till he does attend; it is sufficient to impose a stay for a definite time. *Comstock v. Harris*, 17.

2. *Discovery—Examination of defendants before statement of claim—Ex parte order.*]—In an action by creditors of the defendant R, to set aside conveyances by him to the

desendant G. as fraudulent, the plaintiff swore that it was necessary to have an examination of the defendants before delivering the statement of claim, in order that it might be framed with proper particularity as to the fraud, of which they had no personal knowledge, and a local Judge, upon the application of the plaintiff *ex parte*, made an order for such examination.

Held, that the order should not at any rate have been made *ex parte*; and that in this case the order should not have been made at all, the position of a defendant resisting a claim as to which he has no personal knowledge, and of a plaintiff advancing such a claim being vastly different. *Hooley et al. v. Gilbert et al.* 114.

3. *Discovery—Action on building contract—Examination of architect.*]—In an action against the trustees of an Orange Lodge, for the price of work and materials in building a hall, the chairman of the board of trustees was examined, and could give no information as to the matters in dispute. His examination shewed that the architect employed by the defendants was the person alone from whom the information could be had. The defendants had successfully resisted the production of the plans, as being in the custody of the architect and belonging to him.

Under these circumstances an order for the examination by the plaintiff of the architect, for discovery only, was affirmed. *Smith v. Clark et al.*, 217.

4. *Discovery—Examination of witness—Production of documents—Fraud—Rules, 109, 285.*]—In an action of ejectment, where the plain-

tiff claimed title under a conveyance from the father of the defendant in 1885, and the defendant claimed by virtue of possession since 1874, under a verbal agreement to purchase made with his father, and the defendant said on his examination that he had paid his father money on account of the purchase, which he had entered in his father's books, an order was made for examination of the father and production of his books for the purpose of discovery before the trial.

Held, by the Master in Chambers, that the father might have been made a party under Rule 109, on the ground of his having been a party to a fraud in conveying land to the plaintiffs after he had made an agreement with his son, and such being the case, there was no doubt of his liability to be examined under Rule 285. *McMaster et al. v. Mason*, 278.

5. *Examination—Exclusion from examiner's chambers—Exhibits.*]—Upon an examination before a special examiner at his chambers:—

(1) The examining counsel has no right to have a clerk present to assist him, if the opposite party objects.

(2) If documents are produced by the party under examination, the opposite party is entitled to have them marked as exhibits.

(3) It is within the discretion of the examiner to exclude from his chambers even the solicitor for the examinant, if his presence interferes, in the examiner's opinion, with the due execution of his duty as examiner. *Hands v. Upper Canada Furniture Co., et al.*, 292.

6. *Discovery—Examination—49 Vic. ch. 16, seq. 12 (O.)—Solicitor—“Employee”—“Transfer.”*]—The

solicitor of a judgment debtor who had absconded, transferred property of the judgment debtor to a purchaser, under power of attorney, and received the consideration money, \$4,000. Upon an application to examine the solicitor under 49 V. ch. 16, sec. 12, (O.):

Held, that this provision being remedial and for the purpose of enabling the judgment creditor the better to discover property of his debtor, it should be construed so as to advance the remedy, so far as the fair meaning of the words will permit. The word "transfer" in the expression "any person to whom the debtor has made a transfer of his property or effects" should not be limited to the transfer of the *title* to the property or effects, but should be regarded as equally applicable to the transfer of the *possession*; and therefore the solicitor was a person to whom a transfer of the debtor's property and effects to the extent of \$4,000 had been made, for the possession of that sum had been transferred to him by the debtor.

Per ARMOUR, C. J.—The solicitor was also an employee of the judgment debtor within the meaning of the section. *Gowans v. Barnet*, 330.

7. *Discovery—Action for specific performance—Examination of grantors of vendor before defence—Objections to title—Condition in contract—Time.*—In an action by a vendor for specific performance of a contract for sale of land, at the price of \$24,000, it appeared that less than three weeks before the contract the vendor had obtained a conveyance of the land from his two sisters, in which the consideration expressed was \$5,000. The sisters were old and infirm, and being unmarried lived, and had for a great many

years lived, with the plaintiff, and were said to be under his influence. The defendant was advised that so great a difference in the price required explanation, and had made endeavors to see the sisters, but had been refused access to them, and the plaintiff had refused to procure them to join in the conveyance to the defendant.

Held, that under these circumstances the defendant should be allowed, under Rule 285, to examine the two sisters before delivering his defence.

It was contended on behalf of the plaintiff that the title could not now be objected to by the defendant, as by the terms of the contract all objections to the title were to be notified by the 26th December, 1887, and this was not taken until a week later.

Held, following *Ward v. Stallibrass*, L. R. 8 Ex. 175, that such a condition did not apply to the case of the vendor being unable to give a good title, but only to objections and requisitions which might have been properly enforced against a vendor who had a valid title; and the objection here might go to the root of the plaintiff's title. *Brown v. Pears*, 396.

8. *Discovery — Examination of servant of corporation.*—Where a corporation was sued for negligence resulting in an accident, an order was made for the examination for discovery of the driver of the traction engine which was the alleged cause of the accident. *Odell v. City of Ottawa*, 448.

9. *Evidence — Examination of witness on pending motion—Production of partnership books.*—Upon a pending motion to restrain the de-

fendant from receiving any moneys due under a certain contract, and to appoint the plaintiff receiver of such moneys, an affidavit of the defendant's partner was filed in answer, and he was cross-examined upon it by the plaintiff; he was unable to answer a number of questions with reference to the defendant's position in regard to the partnership, because he had not with him the books of the partnership, from which alone the facts could be ascertained, and he refused to produce such books.

Held, that he should be ordered to attend for further examination, and to produce the books required, at his own expense.

In re Emma Silver Mining Co., L. R. 10 Ch. 194, followed. *Russell v. Macdonald*, 458.

10. *Discovery — Rule 235—Preliminary issue.*]—In an action against the defendants, as executors and residuary legatees under a will, for a declaration that the will should not be admitted to probate on the ground that it was altered after execution, and for administration and partition:

Held, that the case came within Rule 235, and until the plaintiffs established the alteration charged, they were not entitled to discovery of instruments affecting the estate of the testator. *Hurst et al. v. Barber et al.*, 467.

11. *Discovery — Examination of local agent of life insurance company.*]—In an action upon a life insurance policy an order was made, at the instance of the plaintiff, for the examination for discovery only of the local agent of the insurance company who procured the application for insurance. *Hartnett v. Canada Mutual Aid Association*, 401.

12. *Discovery — Examination of officer of corporation—R. S. O. (1877) ch. 50, sec. 156—Ex parte order—Railway conductor—Discovery before second trial from witness examined at first trial.*]—An order for the examination of a person as an officer of a corporation, under R. S. O. (1877) ch. 50, sec. 156, is properly made *ex parte*.

The conductor of a train on which the plaintiff was a passenger when the accident out of which the action arose occurred. *Held*, (by MACMAHON, J.) examinable as an officer of the railway company, under sec. 156.

A person who is called as a witness at the first trial of an action and cross-examined cannot again be examined, under such section, for discovery before a second trial.

On appeal: *Held*, (1) affirming the decision of MACMAHON, J., that the conductor of a train of the defendants through whose alleged misconduct the plaintiff was injured was an officer of the defendants within the meaning of R. S. O. (1877) ch. 50, sec. 156, examinable for discovery in an action for damages for the injuries sustained.

(2) Reversing the decision of MACMAHON, J. (FALCONBRIDGE, J., *dubitante*) that such conductor could be examined by the plaintiff before a second trial, notwithstanding that he had been examined as a witness at the first trial, had been cross-examined by counsel for the plaintiff, and had then offered to produce a certain book in his possession. *Leitch v. Grand Trunk R. W. Co.*, 541, 671.

13. *Discovery — Examination of transferee of judgment debtor—49 Vic. ch. 16, sec. 12 (O.)—Ex parte order—Date of transfer—Service of order—Chattel mortgage a transfer—Appeal*

—*Time*.]—1. An order under 49 Vic. ch. 16, sec. 12 (O.), for the examination of the transferee of a judgment debtor, should not be made without notice to the transferee; nor should an order under that section be made without proof that the transfer was made since the date when the liability of the judgment debtor was incurred.

2. If the original order is not shewn at the time of service of a copy, the person served cannot be brought into contempt for disobedience to it: *Meyers v. Kendrick*, 9 P. R. at p. 366, followed.

3. A chattel mortgage is a transfer of property and effects within the meaning of 49 Vic. ch. 16, sec. 12.

4. A transferee was allowed to appeal from an order for his examination after the time for appealing had expired, his delay being satisfactorily explained. *Blakeley v. Blaase*, 565.

14. *Evidence—Sole witness of accident giving rise to action—Examination before trial*.]—In an action under Lord Campbell's Act, an order was made for the examination before the trial, *de bene esse*, on behalf of the plaintiff, of the only witness to the accident which occasioned the death of the deceased. It was provided that the examination should not be used at the trial unless the plaintiff was unable to procure the attendance of the witness. *Elliott v. Canadian Pacific R. W. Co. et al.*, 593.

15. *Examination—Proof of service of appointment and payment of conduct money—Examiner's certificate—Waiver*.]—Upon a motion by the defendant to compel the plaintiff to attend again for examination, after his refusal to be sworn upon an appointment for his cross-examina-

tion upon an affidavit filed on a pending motion, the only material filed was a certificate of the examiner, which did not shew that due service of subpoena and appointment and payment of conduct money had been made.

Semble, the certificate of the examiner as to these points would not have been sufficient; and

Held, that, in the absence of evidence, it was not to be inferred from the fact that the plaintiff attended at the time and place appointed for his examination, that there was any right then to examine him; and the plaintiff did not by such attendance waive his right to have the service and payment proved. *McLean v. Bruce*, 602.

16. *Discovery—Libel—Privilege—Answers tending to criminate—Costs*.]—No man can be compelled to answer a question incriminating himself. And where the defendant upon his examination for discovery in an action of libel refused to answer questions as to the authorship of an alleged libel, and claimed privilege, not before the examiner, but afterwards upon a motion by the plaintiff to commit him for refusal to answer, swearing positively that the answers might tend to criminate him.

Held, that he was entitled to the privilege, and that it was not too late to claim it.

The costs of the motion to commit were made costs to the plaintiff in the cause. *Hall v. Gowanlock*, 604.

17. *Discovery—Malicious prosecution—Investigation of transactions between the plaintiff and a third person*.]—In an action for damages for falsely and maliciously and without reasonable and probable cause preferring a charge of perjury, and

also a charge of obtaining a valuable security by false pretences, the defence averred that the plaintiff and one J. conspired together to obtain two promissory notes from the defendant by false pretences; that the plaintiff first visited the defendant, and by fraud and falsehood induced him to enter into a contract to purchase certain hayforks, and that J. followed him in course of time, in pursuance of their fraudulent scheme, and by fraud and falsehood and false pretences obtained the notes.

Held, that upon examination of the plaintiff for discovery the defendant should be permitted to inquire into the dealings between the plaintiff and J., fully and freely to ascertain whether J. and the plaintiff were acting in concert, and whether any false pretence made by J. was in fact a false pretence by the plaintiff, and for this purpose might investigate all sales of forks made by the plaintiff or J., or either of them, under any agreement or arrangement, and the history of all notes received in carrying out such sales, and of all entries in the plaintiff's bill books, and all other books, relating to such transactions. *Colter v. McPherson*, 630.

See FOREIGN COMMISSION, HABEAS CORPUS, ARREST, 3—JUDGMENT DEBTOR, 3.

EXAMINATION DE BENE ESSE.

See EXAMINATION, 14.

FORECLOSURE.

Foreclosure—Subsequent incumbrancer—Reference—Interlocutory order—Amending judgment.]—There is no authority in a mortgage

action for foreclosure to make a reference by interlocutory order to a master to add parties with the object of allowing them to redeem or having them foreclosed.

And where the plaintiff in a mortgage action obtained the usual foreclosure judgment and had his account taken thereby without reference, and after final order of foreclosure discovered that a subsequent incumbrance existed, the judgment was amended under Con. Rules 780 and 781 so as to convert it into a judgment under Con. Rule 776, with a reference to the Master in Ordinary to add incumbrancers, take the accounts, &c. *Wilgress v. Crawford*, 658.

See LUNATIC, 1—JUDGMENT, 12—CREDITOR'S RELIEF ACT, 1880.

FOREIGN COMMISSION.

Foreign commission—Evidence of party—Alimony action—Criminal proceedings.]—There is no hard and fast rule as to the granting or refusing of a foreign commission; it is a matter of discretion; but in the case of the examination of a party being sought the Court will be more circumspect than in the case of an ordinary witness.

In an action of alimony where there were allegations of cruelty, and the plaintiff had also instituted criminal proceedings for bigamy against the defendant, who had left the jurisdiction and applied to be examined abroad;

Held, that the defendant was a necessary witness and that the reason given by him for not being able to attend the trial, viz, that he was afraid to return to the jurisdiction on account of the criminal proceedings,

was sufficient; and a commission was ordered. *Mills v. Mills*, 473.

See HABEAS CORPUS.

FOREIGN JUDGMENT.

Action on foreign judgment—Staying proceedings—Appeal in foreign country.]—An action on a foreign judgment was stayed pending an appeal in the foreign state from the judgment sued on, although no stay of execution upon the original judgment was imposed by the foreign court. Terms as to diligence in prosecuting the appeal and preservation of the defendant's property in Ontario in *statu quo* were annexed to the order. *Huntington v. Attrill*, 36.

See COMPANY, 2.

FRAUD.

See COUNTER-CLAIM, 1.

FRAUDULENT CONVEYANCE.

See PARTIES, 2, 3.

HABEAS CORPUS.

Habeas Corpus—Evidence—R. S. O. ch. 70, sec. 1—Foreign Commission—Discovery—Costs.]—Held, that the provision in R. S. O. ch. 70, sec. 6, that the Court or Judge before whom any writ of *habeas corpus* is returnable, may proceed to examine into the truth of the facts set forth in such return by affidavit or by affirmation, is permissive only, and that a Judge has power in such

a case to direct that the evidence shall be taken *viva voce* before him.

And in this matter it was directed as in *Re Murdoch*, 9 P. R. 132, that the evidence should be taken *viva voce*, and it was further ordered that a foreign commission should issue to take evidence abroad, and that the parties to the application should be at liberty to examine each other for discovery before the hearing.

The costs of the demurrer to the return (11 P. R. 482) were given against the father of the infant in any event of the proceeding. *Re Smart Infants*, 2.

See INFANT, 1.

HUSBAND AND WIFE.

See ALIMONY—ADMINISTRATION.

INDEMNITY.

Indemnity—Relief against co-defendants—Procedure where such relief claimed—Trial of questions raised.]—No order is necessary to enable a defendant to plead a claim for indemnity against his co-defendant, but such a claim will not be tried without an order providing for the determination of the question so raised.

P. borrowed money from the plaintiff and then went into partnership with N.; P. and N. afterwards sold the business to B. The plaintiff, having judgment against P., brought this action against P., N. and B. to set aside the sale to B. as fraudulent. P. alleged in his defence that N. agreed to pay half his debts, including that to the plaintiff, and that B. agreed to pay the liabilities of P. and N. appearing on their books,

which the liability to the plaintiff did, and he claimed indemnity against N. and B.

Held, [reversing the decision of the Master in Chambers], that the trial of the question whether or not the sale to B. was fraudulent as against the plaintiff, would involve an inquiry as to the terms upon which B. purchased from the other defendants, and that the whole matter was one that might be advantageously disposed of at one hearing. *Burke v. Pitman*, 662.

INDIAN.

See CONVICTION, 3.

INFANT.

1. *Infants — Custody — Habeas corpus — Petition.*]—A father was proceeding by *habeas corpus* to obtain an order awarding him the custody of his infant children.

Held, (by FERGUSON, J.,) that a more comprehensive adjudication could be had upon a petition, and that there was power to direct that a petition should be substituted for the *habeas corpus* proceedings.

Such a direction was given where it appeared to be in the interest of the infants and all concerned. *Re Smart Infants*, 312.

2. *Infants — Custody — Habeas corpus — Petition — Rule 474, O.J.A.*]—The order of FERGUSON, J., *supra* was confirmed with one variation, viz., the *habeas corpus* to run concurrently with the petition directed to be filed, and to be disposed of with it. *Re Smart Infants*, 435.

3. *Infant—Defendant qua executor — Service on official guardian.*]—*Held*, that administration proceedings taken against an infant co-executor without observing the usual practice of serving the official guardian were invalid.

The provisions of the rules and general orders as to service in case of infancy apply whether the infant be a sole or a joint defendant, and whether he be sued personally or in a representative capacity. *Re Jackson Massey v. Crookshanks*, 475.

4. *Infants — Custody — Habeas corpus — Petition — Amendment — Con. Rule 444 — Appeal — Waiver.*]—The order of the Chancery Divisional Court, 12 P. R. 435, affirmed on appeal.

Held, that the infants' father had waived his right to appeal from the order directing the filing of a petition by having complied with such order.

Semble but for the waiver, the appeal of the father must have succeeded; for the power given by Rule 474, Ontario Judicature Act, (Con. Rule 444), is to amend any defects or errors, not to compel a litigant to adopt a different form of remedy for one which is in itself competent and regular. *Re Smart Infants*, 635.

5. *Infants—Habeas corpus—Right of father to custody—Age of infants — Habits of parents—Religious belief—R. S. O. ch. 137, sec. 1.*]—Upon an application by the father of two infants, under the ages of five and three respectively, for a *habeas corpus* to obtain their custody from the mother, it appeared that the applicant was a man of drunken habits and of evil conversation, that he had beaten his wife and so ill-treated her

that she was justified in leaving him while she was a moral and sober woman. It was also shewn that the maternal grandmother of the infants was able and willing to give them a home with their mother, who lived with her, while the paternal grandmother was neither able nor willing to do so.

Held, that, having regard to the welfare of the infants and the conduct of the parents, the mother should have the custody for the present.

It was urged that the father had a right to have the children brought up as Presbyterians, and that the mother and her mother were both members of the Salvation Army.

Held, that this question was not a pressing one owing to the tender age of the infants; the father might raise it again.

Held, also, that, having regard to the wide discretion given by R. S. O. ch. 137, sec. 1, the Judge was freed from any possible obligation to make, upon the application of the father, an order which would be reversed on the application of the mother. *Re Dickson, Infants*, 659.

before the Police Magistrate who tried the defendant; the defendant appeared, submitted to the jurisdiction, was called as a witness for the prosecution, gave evidence as to the offence alleged against him, and was convicted. The conviction shewed that the Act was in force when the offence was alleged to have been committed.

Held, that it was no objection to the information that it did not state the particular date of the offence, or, under the above circumstances, that the Act was in force in the place where it was alleged to have been committed; in any case these defects in the information were mere irregularities and were cured by R. S. C. ch. 178, sec. 87.

Held, also, that it was no objection to a warrant of commitment in default of distress that it was issued prior to the expiration of a warrant of remand, provided that it was issued after the return of the distress warrant.

Held, lastly, that the commitment of the defendant to the gaoler of the common gaol of the county in which the defendant was convicted was proper. *Regina v. Collier*, 316.

See CONVICTION, 2, 3.

INFORMATION.

Canada Temperance Act — *Information* — *Date of offence* — *Irregularities* — R. S. C. ch. 178, sec. 87 — *Warrant of commitment* — *Conviction*.] — An information for an offence against the Canada Temperance Act charged that it was committed "within the space of three months last past," and did not state that the Act was in force in the place where the defendant was alleged to have committed the offence. No objection to the jurisdiction was taken

INJUNCTION.

See APPEAL, 12.

INTEREST.

See COSTS, 31, 33.

INTERIM ALIMONY.

See ALIMONY.

INTERLOCUTORY ORDER.

See APPEAL, 10.

INTERPLEADER.

1. *Interpleader order—Order to produce—Motion for irregularity.*—After delivery of an interpleader issue a party to it may take out a præcipe order for production by the opposite party.

Such order should be issued and the record passed in the principal office of the Court in Toronto, as no locality is pointed out by the usual proceedings in interpleader.

A notice of motion for irregularity should shew or refer to affidavits shewing what the irregularity is. *Dominion S. & I. Company v. Kilroy*, 19.

2. *Interpleader—Sale of goods under order—Levy of money under execution—Creditors' Relief Act, 1880—49 Vic. ch. 16, sec. 35—Costs.*—A sheriff had seized goods under writs of *fi. fa.* in his hands, when the goods were claimed by a chattel mortgagee. An interpleader issue was directed, and an order was made for the sheriff to sell the goods and pay the proceeds into Court, which was done. After the claim of the chattel mortgagee had been barred a question arose as to the distribution of the money in Court.

Held, that the seizure under the writs, together with the conversion into money by the sheriff under the order of the Court, and the final barring of the claim of the chattel mortgagee, constituted a levying of the money under the writs by the sheriff in the sense of sec. 5 of the Creditors' Relief Act, 1880, and

therefore that the money in Court should be distributed ratably according to the provisions of that Act; but

Held, also, upon a liberal construction of sec. 35 of 49 Vic. ch. 16 (O.), that the execution creditors who contested the chattel mortgagee's claim in the interpleader were entitled to their costs of the interpleader as "costs of the execution" if they failed to recover them from the claimant. *Levy v. Davies*, 93.

3. *Interpleader—Sale of goods—Sheriff's charges.*—By an order made upon an interpleader application, a sheriff was directed to sell the goods in question and pay the proceeds into Court, less his possession money and expenses of seizure and sale. The sheriff did so; the interpleader issue was tried, and resulted in favour of the claimant.

An order was then made in Chambers directing that the sheriff should pay into Court the amount retained by him under the previous order, and that the execution creditor should pay the sheriff his proper charges for possession money, &c.

Held, that this was the proper order to make. *Reid v. Murphy*, 246.

4. *Interpleader—Sale of goods—Sheriff's charges.*—After an interpleader order is made at the instance of a sheriff, the special jurisdiction of the Court under the Act relating to interpleading arises, by which the writ of execution, as such, ceases to operate, and the sheriff in selling the good seized thereunder acts not for the execution creditor but for the Court under the interpleader order. Where, therefore, a sheriff, under

such circumstances, sold goods which were found by the event of an interpleader issue not to have been the goods of the execution debtor, but of the claimant, and paid the proceeds into Court less his charges for possession money and expenses of sale, &c. ;

Held, that he was not liable to refund to the claimant the amount deducted for such charges.

The claimant's remedy is to recover the amount of such charges from the execution creditor, which he can do in a summary way.

The decision of PROUDFOOT, J., *supra*, reversed. *Reid v. Murphy*, 338.

5. *Interpleader — Liability for costs of execution creditor not contesting claim.*]—A banking corporation, one of several execution creditors made parties to an interpleader issue, did not desire to contest the right of the claimant to its share of the proceeds of the goods seized and sold, but was willing that such share should be paid over to the claimant, in the event of the latter not succeeding in the issue.

Held, that the corporation was not under these circumstances liable to contribute to the costs of the issue ; but, nevertheless, was properly made a party to the issue, and would be entitled, if the plaintiff failed, to its proportion of the proceeds arising from the sale of the goods. *Dundas v. Darvill et al.*, 347.

See COSTS, 7, 21—SOLICITOR AND CLIENT, 8.

IRREGULARITY.

See INTERPLEADER, 1—STATEMENT OF CLAIM.

JUDGE IN CHAMBERS.

See APPEAL, 13.

JUDGE IN COURT.

See APPEAL, 10.

JUDGMENT.

1. *Judgment by default—Setting aside — Security — Disposal of property — Interest.*]—The plaintiff claimed \$923.13, the balance of an account, and interest thereon, and signed judgment for default of an appearance upon the special indorsement of his writ of summons for \$1,253.

The defendant moved to set aside the judgment, swearing that he had failed to enter an appearance owing to a misapprehension, denying positively that he owed the plaintiff anything, and alleging that he at one time owed him \$250, but that it had been satisfied by the plaintiff taking one A. as his debtor instead of the defendant, and further, that if the debt had not been satisfied by A., it was barred by the Statute of Limitations. No affidavit was filed on behalf of the plaintiff verifying the debt, and the arrangement as to substituting A. was not denied. A local Judge set aside the judgment, but only on the terms that the defendant should give security for or pay into Court the sum of \$250.

Held, that if upon an application by the plaintiff, under Rule 80 or Rule 324, for leave to enter judgment, such a defence had been sworn to, and such circumstances had appeared, the application would not have been granted, and payment into Court or security would not have

been exacted from the defendant as a condition of his being allowed to defend, there is no substantial difference between the case where a party seeks the right to defend before judgment signed, and the case where the judgment has been signed on account of a slip or misapprehension, and the defendant makes out a case giving him the right to defend; and therefore terms should not have been imposed upon the defendant. The disposal by the defendant of his property liable to execution since the service of the writ of summons upon him was not a matter to disentitle him to relief that otherwise could not properly have been denied him.

Runnacles v. Mesquita, 1 Q. B. D. 418, followed.

Semble, if the defendant's statements were true, the plaintiff would not have been entitled to interest on the amount of his claim, and the judgment would have been irregular. *Dobie v. Lemon*, 64.

2. *Judgment, setting aside—Security—Execution.*]—The plaintiffs signed judgment on default of appearance in an action for a money demand, and the defendant was afterwards, upon application to a local Judge, let in to defend upon the merits, upon certain conditions, one of which was, "the judgment and execution (*fi. fa.* goods) now in force to stand as security to the plaintiffs unless and until the defendant pays into Court the amount of the plaintiffs' claim, or gives security therefor." The defendant did not pay into Court or give security. The action was tried and a verdict given for the plaintiff; subject to a reference to ascertain the proper amount due to the plaintiffs; and the referee found a less amount due than that for which judgment had originally been

entered. After verdict and before the finding of the referee, the plaintiffs issued and delivered to the sheriff a *fi. fa.* against the lands of the defendant on the original judgment.

Semble, the original judgment could not stand when the case was reopened, and the defendant let in to defend; but as the parties had treated the judgment as standing,

Held, that it and the *fi. fa.* goods should be reduced to the sum found by the referee, instead of entering a new judgment; but that the issue of the writ of *fi. fa.* lands was quite unwarranted. *Hillyard et al. v. Swan*, 226.

3. *Judgment after verdict*—"The Court"—*Trial Judge—Divisional Court—High Court of Justice—Rules 315, 321*]—The Court may upon motion enter judgment upon the verdict given at the trial, where the trial Judge has not done so.

Quære, whether such motions should be to the Divisional Court.

"The Court," in Rules 315, 321, means the High Court of Justice; whether as distinguished from its Divisions or not.

Where after a verdict, the Judge presiding at the trial died before giving judgment thereon, it was directed that an order for judgment should be drawn up in the High Court, before the three Judges who composed the Divisional Court of the Common Pleas Division, as Judges of the High Court. *Wellbanks v. Conger*, 354.

4. *Judgment—Date of entry—Rules (O. J. A.) 326, 327, 527 (b)*]—Although by Rule 527 (b) judgment is not to be signed in cases tried by a jury till the time thereby prescribed, yet, when signed, the entry

of it, if the Divisional Court pronounces no different judgment from that of the trial Judge, ought to be dated as of the day on which it was pronounced by the trial Judge.

Rule 326 applies to all cases, whether tried by a Judge, jury, or otherwise, in which the judgment is pronounced by the Court or a Judge in Court, and Rule 327 applies to cases in which the judgment has not been pronounced by the Court or Judge in Court.

Where the judgment pronounced by the trial Judge upon the verdict of a jury was varied by a Divisional Court.

Held, that judgment should be entered as of the date on which the Divisional Court pronounced judgment. *Beckett v. Grand Trunk R. W. Co.*, 377.

5. *Judgment—Motion under Rule 324—Material necessary.*]—In order to obtain under Rule 324 a speedy judgment before the time for appearance in an action has expired, a plaintiff must shew that some injury or injustice is likely to happen or to be done to him if he is not awarded immediate relief.

And where the affidavit of a plaintiff stated that he verily believed it was necessary for the plaintiffs to get immediate judgment in order to protect their interests and prevent any disposition of the estate that might be prejudicial to the creditors, but no facts were set out upon which such belief was founded, and the utmost shewn was that the defendant was in financial straits, and had refused to submit his affairs to investigation or to make an assignment:

Held, that a motion under Rule 324 for judgment before appearance must be refused. *Greene et al. v. Wright*, 426.

6. *Judgment—Combined interlocutory and final—Rules 72, 75.*]—Where a writ of summons is indorsed with the particulars of a liquidated demand, and also with a claim for unliquidated damages, the plaintiff may, without an order, sign a combined final and interlocutory judgment upon default of appearance; Rules 72 and 75 may be combined in a proper case, and justify such a judgment.

Bissett v. Jones, 32 Ch. D. 635, followed in preference to *Standard Bank v. Wills*, 10 P. R. 159. *Huffman v. Doner*, 492.

7. *Promissory note—Proposal to renew in part refused—Effect of acceptance of cheque for balance—Judgment under Rule 80.*]—At maturity of certain promissory notes made by the defendants, and held by the plaintiffs, the defendants sent the plaintiffs a proposal for a renewal in part, accompanied by a cheque for part of the amount due and two renewal notes for the balance, the total amount including a sum for interest on the renewals. The plaintiffs returned the renewal notes, but retained the cheque, and brought this action upon the original notes, giving credit for the amount of the cheque.

Held, by STREET, J., in Chambers, refusing a motion for judgment under Rule 80, that although there was no obligation on the part of the creditors to assent to the debtors' proposal, yet by receiving the cheque and keeping it they must be taken to have applied it in the manner in which the debtors when tendering it stipulated, and as it included interest in advance upon the renewals, the creditors were bound to give the debtors the benefit of the time for which the renewals were drawn.

Held, by a Divisional Court, on appeal, that on the state of facts presented the plaintiffs were not entitled to the indulgence of a speedy judgment and execution. *Lowden et al. v. Martin et al.*, 496.

8. *Judgment under Rule 80—Writ of summons—Special indorsement*]—The writ of summons was indorsed as follows: "The plaintiff's claim is for \$213.90, balance due for sawing wood by the plaintiff for the defendant."

Held, not a sufficient special indorsement to admit of the plaintiff moving for judgment under Rule 80. *Villeneuve v. Wait*, 505.

9. *County Courts—Term motion—Time for making—R. S. O. 1887, ch. 47, secs. 29, 41—Rule 488.*]—Reading sec. 41 with sec. 29 of the County Courts Act, R. S. O., 1887, ch. 47, and having regard to the provisions of Rule 488.

Held, that a party may move before the Judge in Court against the verdict or judgment at the trial either before, or during the first two days of the next quarterly sittings after the trial. The motion is not necessarily to be made at the usual fixed sittings; the Judge may entertain it at any previous time.

Scope of sec. 42, sub-sec. 5, R. S. O. 1887, ch. 47, as to moving before the County Court to set aside the judgment at the trial, observed on.

Smith v. Rooney, 12 U. C. R. 661, is not applicable to the existing law and practice. *Norton v. McCabe*, 506.

10. *Judgment—Summary order for, upon money demand—Leave to proceed upon another claim.*]—There may be two judgments in one action.

Leave was given to the plaintiff

to sign judgment under Con. Rule 739 for the amount of a money demand, and to proceed upon another claim in the same action. *Hay v. Johnston*, 599.

11. *Judgment under Con. Rule 756—Stage of action when ordered—Admissions in letters.*]—An application for judgment under Con. Rule 756 cannot be made until the right of the party applying to the relief claimed has appeared from the pleadings.

And an order made under that rule, before the delivery of any pleading in the action, based on admissions in letters, was set aside. *McLeod v. Sexsmith*, 606.

12. *Reference, scope of—Judgment of foreclosure—Pleadings—Con. Rules, 56, 57.*]—A judgment directed that the Master should take the usual accounts for redemption or foreclosure of mortgaged premises and should also take the accounts in respect to certain other matters set out in the pleadings. Under this the defendant contended that the Master should take into account a certain sale by the plaintiff, as mortgagee, to a person who, it appeared, had not paid his purchase money. There was no specific mention of this sale in the pleadings or judgment.

Held, that the proposed inquiry was not within the scope of the pleadings or the judgment or of Con. Rules 56 and 57; and the questions which it would raise were questions which ought to have been raised by the pleadings and determined by the Court, and not delegated to the Master.

Bickford v. Grand Junction R. W. Co., 1 S. C. R. at p. 725; *McDougall v. Lindsay Paper Mill Co.*, 20 U. C. L. J. N. S. 133; *Wiley v.*

Ledyard, ib. 142, referred to. *Rowland v. Burwell*, 607.

13. *Partnership — Judgment against firm—Execution against alleged partner—Con. Rules 756, 876.*]

—The plaintiffs recovered judgment against the defendants, sued as a partnership firm, by default of appearance, after service of the writ of summons upon M., a member of the firm, and then moved under Con. Rule 876 for leave to issue execution upon such judgment against D., as a member of the firm, who had appeared. D. disputed his liability, but upon his cross-examination upon an affidavit filed on the motion, such facts appeared as convinced the Master in Chambers that he was a general partner, and he made the order asked for. The Master

Held, that the admissions of D. in his cross-examination justified the order under Con. Rule 756, and avoided the necessity of sending an issue to be tried under Con. Rule 876.

Held, also, that Con. Rule 756 was applicable at this stage of the cause, *i.e.*, after judgment obtained without pleadings. *Tennant & Co., v. Manhard & Co.*, 619.

See COSTS, 20—LUNATIC, 1—NOTICE OF MOTION, 1, 2—FORECLOSURE.

JUDGMENT DEBTOR.

1. *Judgment debtor — Committal for unsatisfactory answers.*]—The defendant, a widow, upon her examination as a judgment debtor admitted having lent her brother \$300, and having in her house at time of the examination \$100, which she refused to hand over to apply on the judgment, because she had no

other property with which to support herself and three children.

The Judge to whom an application to commit the defendant for unsatisfactory answers was made, held that the facts of the case did not bring it within the decisions in *Metropolitan L. & S. Co. v. Mara*, 8 P. R. 355, and *Crooks v. Stroud*, 10 P. R. 131, and without laying down any rule, declined, in the exercise of his discretion, to order a committal without further information than was afforded by the examination. *McKay v. Atherton et al.*, 464.

2. *Contempt of court—Attachment—Judgment debtor—Examination of—Married woman—Judgment for costs.*]—*Held*, that the defendant was liable to committal for contempt in not attending to be examined as a judgment debtor, although she was a married woman and the judgment was one for costs. Her imprisonment under such committal would not be an imprisonment for non-payment of costs. *Pearson v. Essery*, 466.

3. *Judgment debtor—Examination—Duty of debtor—Unsatisfactory answers—Notice of motion to commit.*]—It is the duty of a party who is examined as a judgment debtor to furnish such explanation about his affairs as will place his dealings in an intelligible shape, and not leave his creditors to find out, as best they may, what it is the business of the debtor to make clear.

Nor is it enough for the debtor to say, touching any particular transaction, that he does not know or does not remember, if he have the means at hand to qualify himself to explain.

A notice of motion seeking relief against a party for giving unsatis-

factory answers on his examination should particularize the answers complained of.

Precision should be used on the examination in ascertaining the exact state of facts, as shewn in books or accounts, and care exercised that there is no uncertainty as to any dates or amounts in question, as the Judge can only look at what is proved or admitted.

On the state of facts referred to in the judgment, the defendant was ordered to attend and be further examined at his own expense, and to pay the costs of a motion to commit him for unsatisfactory answers.

Ex parte Bradbury, 14 C. B. 15, and *Ex parte Moir*, 21 Ch. D. 61, followed.

Crooks v. Stroud, 10 P. R. 131; *Lemon v. Lemon*, 6 P. R. 184; and *Hobbs v. Scott*, 23 U. C. R. 619, discussed. *Foster v. Van Wormer*, 597.

See EXAMINATION, 6, 13—ARREST, 3.

JURISDICTION.

See ATTACHMENT, 5—CONVICTION, 3—COSTS, 21—JUSTICE OF THE PEACE—MANDAMUS, 2—JUDGMENT, 12.

Of Division Court.—See PROHIBITION, 4, 7.

Of County Court.—See COSTS, 32—ARREST, 4.

JURY.

1. *Jury notice—Money demand—Equitable cause of action—Severing issues—Rule 256, O. J. A.—Trial Judge—C. L. P. Act, sec. 255.*—The action was brought (1) for the

recovery of instalments of money due under a scrip contract, and (2) for a declaration of the plaintiffs' right to specific performance of the part of the contract as to settlement duties, the time for performance not having yet arrived.

Held, PROUDFOOT, J., dissenting, a proper case in which to exercise the power under Rule 256, O. J. A., of severing the action so as to have that part of it which is preliminary tried first, the defendants having a *prima facie* right to a jury as to the main matter in controversy, the (1) claim; while the (2) claim could be better tried without the intervention of a jury.

The defendants' jury notice, which had been struck out, was restored, and the whole action was left to the judge at the trial to try partly with a jury and partly without a jury, or altogether without a jury, as he might think advisable.

Per PROUDFOOT, J.—The Court or a Judge has power by the C. L. P. Act, sec. 255, to act before the trial by striking out the jury notice, and the power should be exercised when it is perfectly clear that the issues are such that they cannot be properly tried by a jury; the question should not in every case be left to the trial Judge to determine. *Temperance Colonization Society v. Evans et al.*, 48, 380.

2. *Jury notice—Legal and equitable issues—C. L. P. Act, secs. 257 and 258.*—The plaintiffs sued, as executors of McB., to recover from the defendant, a solicitor, money placed in his hands for investment, and notes and money received by him as solicitor and agent for McB., and prayed that the defendant might be ordered to assign certain securities in his hands. The defendant set

up by way of defence a certain agreement, under which he alleged that the plaintiffs were estopped from making their claim. The plaintiffs then amended their statement of claim, setting up fraud in procuring this agreement, and asked that it might be declared void, and be delivered up to be cancelled.

Held, that the case came within secs. 257 and 258 of the C. L. P. Act, and that the legal issues should be tried by a jury, and the equitable issues by a Judge without a jury, unless the Judge at the trial, in the exercise of his discretion, chose to try the whole case without a jury; but that the defendant was not entitled as a matter of right to have the jury notice struck out.

Temperance Colonization Society v. Evans, ante p. 48, followed. *McMahon et al. v. Lavery*, 62.

3. *Jury notice—Equitable claim—Demurrer.*—Where the plaintiffs claimed specific performance of a contract to supply them with milk for a cheese factory upon certain terms, and in the alternative damages, and the defendant asked for rectification of the contract, a jury notice was struck out.

Held, that where a party seeks equitable relief to which he is not entitled, the opposite party should, unless in a very clear case, demur, instead of attacking the pleading indirectly by asking to have a jury.

Bingham v. Warner, 10 P. R. 621, commented on. *Fraser et al. v. Johnston et al.*, 113.

4. *Trial by jury—Discretion of trial Judge—C. L. P. Act, sec. 255.*—The trial Judge has by sec. 255 of the Common Law Procedure Act a discretion to try any case with or without a jury as he may think best

and his discretion will not be interfered with by a Divisional Court. *Brown v. Wood*, 198.

5. *Jury notice—Action to enforce lien on land—Severing issues.*—An action for part of the price of a machine and to enforce a lien on land for such price, with a defence of breach of warranty in the defective condition of the machine, is not distinguishable from an ordinary mortgage action. Such an action would have been in the exclusive jurisdiction of the Court of Chancery before the Judicature Act, and a jury notice is therefore improper under sec. 45, O. J. A.

A separate trial by jury upon the issue raised as to the character of the machine should not be ordered in a case of this kind, where there is but one cause of action.

Temperance Colonization Society v. Evans, 12 P. R. 48; *McMahon v. Lavery*, 12 P. R. 62, distinguished. *Farran v. Hunter*, 324.

6. *Jury notice—Equitable issues—C. L. P. Act, sec. 257—Disagreement of jury—New trial.*—Where equitable issues are raised a jury is not of right but of grace under sec. 257 of the C. L. P. Act.

And where, in an action, brought under an order of the Court made in a former action, to try the plaintiff's right as against the now defendants to the possession of certain land recovered in that action, equitable issues were raised, and the case had been once tried before a jury, who had disagreed;

Held, that an order striking out the jury notice was properly made. *Adamson v. Adamson et al.*, 469.

7. *Jury notice—Action to rescind contract—R. S. O. ch. 44, sec. 77—*

Parties—Joint contractors.] — The action was brought to rescind a contract for the sale of a vessel by the plaintiffs to the defendant, on the ground that the defendant had failed to perform his part of the contract, and for damages for breach of the contract and for injuries to the vessel, which had been delivered to the defendant, and to restrain the defendant from dealing with it, and for delivery up thereof.

Held, that this was an action over the subject of which, before the Administration of Justice Act, 1873, the Court of Chancery had exclusive jurisdiction, and a jury notice was therefore improper, under sec. 77 of the Judicature Act, R. S. O. ch. 44.

The defendant applied to add as a co defendant one W., on whose behalf, as well as his own, the defendant had made the contract in question, and who with knowledge of it had ratified and adopted it, but who was not formally a party to it.

Held, following *Kendall v. Hamilton*, 4 App. Cas. at p. 513 *et seq.*, that the defendant had no right to force W. upon the plaintiff as a defendant, in the character of a joint contractor.

Quere, whether W. would have a right to be brought in as a defendant on his own motion. *Toronto and Hamilton Navigation Co. v. Silcox*, 622.

JURY NOTICE.

See JURY, 1, 7.

JUSTICE OF THE PEACE.

Magistrate—City and county—Jurisdiction—R. S. O. ch. 72, sec. 6.]

—R. S. O. ch. 72, sec. 6, does not limit the territorial jurisdiction of county magistrates, but prohibits them from acting “in any case for any town or city”—the limitation is as to the cases, not as to place, and is only partial, *i. e.*, for a city where there is a Police Magistrate, and then only when not requested by such Police Magistrate to act, or when he is not absent through illness or otherwise; and therefore in any case arising in a county, outside of a city, a county justice having jurisdiction to adjudicate while sitting in the county, may adjudicate while sitting in the city.

Legislation on the subject reviewed.

Owing to changes in the statute law the decisions in *Regina v. Row*, 14 C. P. 307, and *Hunt v. McArthur*, 24 C. R. 254, are no longer applicable. *Regina v. Riley*, 98.

See CONVICTION, 1, 2, 3, 5.

LANDLORD AND TENANT.

1. *Landlord and Tenant—Attachment of debts—Rent—R. S. O. ch. 136, secs. 2-6—Mortgagor and Mortgagee.*]—R. S. O. ch. 136, secs. 2-6, does not contemplate any alteration of the law where the case remains strictly between landlord and tenant, but makes a severance where a third interest intervenes.

And where a judgment creditor garnished rents accruing due from several tenants to the judgment debtors before any of the gale days had arrived.

Held, that he was entitled to payment over upon the gale days of the proportion of the rents which had accrued due on the day of service of the attaching order.

Quære, whether the rents could be garnished against a mortgagee of of the landlord. *Massie v. Toronto Printing Co.*, 12.

2. *Landlord and tenant—Ejectment—Title of landlord, expiry of—Bona fide defence—Ejectment Act, secs. 65, 66.*]—In an action of ejectment by a landlord against a tenant whose term had expired.

Held, that the defendant was not precluded from setting up that the plaintiff's title expired or was put an end to during the term; and to raise such defence it was not necessary for the tenant to go out of and then resume possession.

Secs. 65 and 66 of the Ejectment Act do not apply where a *bona fide* defence or dispute is raised, and in this case a motion by the plaintiff for security for damages and costs, under these sections, was refused, reversing the decision of the Master in Chambers.

Quære, whether secs. 65 and 66 would apply to any case where the tenant actually gives up possession, so that the landlord is in possession, and then retakes.

Held, per the MASTER IN CHAMBERS, that it is not now necessary for the plaintiff to sign the notice under sec. 5 of the Ejectment Act, requiring the defendant to give the security sought. *Kelly v. Wolff*, 234.

See COSTS, 24, 32.

LIBEL.

See COSTS, 17—EXAMINATION, 16.

LIQUIDATOR.

See WINDING UP PROCEEDINGS, 1. 2.

LOCAL JUDGE.

See COSTS, 21.

LOCAL MASTER.

See REFEREE, 3.

LUNATIC.

1. *Foreclosure—Opening—Irregularities—Lunatic defendant—Appointment of guardian ad litem—Chambers judgment—Rule 69, O. J. A.—G. O. chy. 434, 645.*—In a mortgage action for foreclosure a local Master appointed the Official Guardian to represent a lunatic defendant as guardian *ad litem* without notice being served, as directed by Rule 69, O. J. A. The guardian made full inquiries, communicated with the relatives of the lunatic, and put in the usual formal defence on behalf of the lunatic, and a judgment of foreclosure was obtained in Chambers against all the defendants, including infants and the lunatic defendant.

Held, that the order appointing the guardian was an erroneous one, for which there was no proper foundation, not a mere irregularity which could be waived by the subsequent steps taken to protect the lunatic's rights.

Held, also, that the term, "adult," in G. O. Chy. 645, does not include a lunatic or person of unsound mind; and therefore that a judgment against a lunatic could not be obtained in Chambers under G. O. Chy. 434. *Warnock v. Prieur et al.*, 264.

2. *Lunatic—Intervention of official guardian—Con. Rules 335 to 338—R. S. O. 1887, ch. 44, sec. 32.*]—

Where a defendant in an action becomes of unsound mind after judgment, it is not proper to notify the official guardian to intervene without serving the defendant and obtaining an order of the Court, by procedure analogous to that provided by Con. Rules 335 to 338.

But where a person has been found by the Court to be of unsound mind the official guardian may be served, without order or notice to the lunatic.

Sec. 32 of R. S. O. (1887) ch. 44, must be limited to cases mentioned in the marginal note thereto, which correctly defines the scope of the enactment. *Wolff v. Ogilvy, re Hagar*, 645.

MAGISTRATE.

See JUSTICE OF THE PEACE.

MALICIOUS PROSECUTION.

See EXAMINATION, 17—PLEADING, 3.

MANDAMUS.

1. *Mandamus* — *Motion for in Court or Chambers* — *Costs* — *O. J. Act*, sec. 17, sub-sec. 8—*R.S.O. (1877) ch. 52, sec. 17.*]—Sec. 17, sub-sec. 8, of the O. J. Act applies to motions for *mandamus*, etc., where an action is pending; but R. S. O. (1877) ch. 52, sec. 17, specially authorizes a summary application for a *mandamus* in Chambers.

Kincaid v. Kincaid, 12 P. R. 462, distinguished.

And where a summary application for a *mandamus* was made to the Court, costs as of a Chambers appli-

cation only were allowed to the applicant, where the circumstances did not justify the imposition of a larger amount of costs than was sufficient to indicate that the respondents were in the wrong. *Re Brookfield and the Trustees of Public School Section No. 12 of the Township of Brooke*, 485.

2. *Mandamus*—*Division Court*—*Abandoning excess of claim at trial*—*Discretion.*]—General Rule 8 of the Division Courts provides that when the excess of a claim is abandoned to bring the amount within the jurisdiction, it must be done in the first instance on the claim.

Held, that this rule does not prevent the Judge before or at the trial from permitting the plaintiff to amend his claim upon such terms as he thinks fit; and General Rule 118 and section 304 of the Division Courts Act afford ample authority for permitting such amendment; but the Judge cannot be compelled by *mandamus* to exercise his discretion to permit an amendment. *Re White v. Galbraith*, 513.

MARRIED WOMAN.

See COSTS, 16—PROHIBITION, 6—INTERIM ALIMONY.

MASTER IN CHAMBERS.

Rescinding order — *Powers of Judge*—*Appeal.*]—A motion made to the Master in Chambers on the 27th October, 1886, to rescind his own *ex parte* order of 13th October, 1886, allowing the executrix of the plaintiff to issue execution for the costs of a motion for prohibition, was referred to a Judge in Cham-

bers. The motion was made after execution had been issued and placed in the sheriff's hands.

Held, that neither the Master nor the Judge in Chambers had the power to rescind the order; and the motion was too late to be treated as an appeal.

McNabb v. Oppenheimer, 11 P. R. 214, followed.

Stanior v. Evans, W. N. Dec. 25, 1886, p. 210, considered. *Re Doyle v. Henderson*, 38.

MECHANICS' LIEN.

Mechanic's lien—Execution creditor—Priority—Master's office.—An execution creditor whose writ of *fi. fa.* lands is placed in the sheriff's hands subsequent to the registration of a mechanic's lien, but prior to the institution of proceedings by action thereunder, is a subsequent not a prior incumbrancer to such lien, notwithstanding that he is not made a party to such proceedings within the period of ninety days prescribed by the Mechanics' Lien Act.

Such a creditor is properly made a party in the Master's office. *Cole v. Hall*, 584.

See PARTIES, 6.

MOTION FOR JUDGMENT.

See MORTGAGE AND MORTGAGEE—NOTICE OF MOTION, 2.

MORTGAGOR AND MORTGAGEE.

Mortgagor and mortgagee—Assignment of mortgage to third person—49 Vic. ch. 20, sec. 7 (O.)—Motion

for judgment—Rule 322—Admissions in affidavit on former motion.]

—The defendant made two mortgages to the plaintiff on the same property. The first mortgage being overdue, the plaintiff brought this action, asking for sale, payment, and possession. After service of the writ of summons, the amount due and costs were tendered by the defendant, and also an assignment of the first mortgage to a third person, for execution by the plaintiff, under 49 Vic. ch. 20, sec. 7 (O.) The plaintiff refused to execute this because of his second mortgage, although he was willing to execute a discharge; and the defendants moved for a *mandamus* to compel him to execute an assignment.

Held, that the plaintiff was justified, notwithstanding the above enactment, in refusing to execute the assignment.

This motion having been dismissed a statement of claim was filed, and a statement of defence in which the first mortgage was admitted, and the tender and the refusal were set up. The plaintiff then joined issue. There was no reference in the pleadings to the second mortgage.

On motion for judgment under Rule 322:

Held, that the admissions in the affidavit of the defendant filed on the former motion, could be used upon this motion; and that in view of what was held upon the former motion, there must be judgment for the plaintiff upon the pleadings and affidavit.

Held, also, that a motion under this rule is properly a Court motion. *Rogers v. Wilson*, 322, 545.

See LANDLORD AND TENANT, 2—SOLICITOR AND CLIENT, 5—CREDITORS' RELIEF ACT, 1880.

MUNICIPAL ELECTION.

1. *Municipal election—Quo warranto—Defective material—State ment—Recognizance—Affidavit—Amendment.*—Upon an application for a *fiat* for the issue of a summons in the nature of a *quo warranto* under the Municipal Act of 1883, to try the validity of the respondent's election as a municipal councillor, the statement of the relator did not shew that he was a candidate or an elector who voted or who tendered his vote at the election, as required sec. 185 of the Act; and the recognizance filed by the relator was not entered into before a Judge, or commissioner for taking affidavits, nor allowed by the Judge, in the manner prescribed by sec. 186, nor was it conditioned to prosecute the writ with effect; and the affidavit of the relator in support of the application did not set out fully and in detail the facts and circumstances alleged in the statement, as required by rule 2 of the Rules of Michaelmas Term, 14 Vic.

Held, that these were defects in the material necessary to found the application, not mere irregularities which could be amended at a later stage, and the *fiat*, the writ, and all proceedings were set aside, with costs. *Regina ex rel. Chauncey v. Billings*, 404.

2. *Municipal corporations—Controverted election—Addition of new territory to city—Disqualification of voters—R. S. O. (1887) ch. 184, secs. 84, 89.*—Where a city made additions to its territory, and thereby included within its corporate limits a portion of an outlying township:

Held, that regard being had to the provisions of the Municipal Act R. S. O., (1887), ch. 184, secs. 84,

89, persons who, but for such action on the part of the city, would have been entitled to vote in the township, were thereby debarred from voting at the township municipal election next ensuing, notwithstanding that the nomination of candidates for such election took place before such addition. *Regina ex rel. Taverner v. Willson*.

NOMINAL DAMAGES.

See COSTS. 17.

NOTICE OF MOTION.

1. *Notice of motion, grounds of—Amendment.*—A notice of motion to a Divisional Court against the verdict and judgment at the trial, on the ground of non-direction, should shew how and in what matter there was non-direction. The Court may allow an amendment of the notice in a proper case; but it declined to assist the defendant by doing so where the non-direction was not material in view of other facts and findings, and the rule of law invoked by the defendant would have operated against a meritorious claim of the plaintiff.

Pfeiffer v. Midland R. W. Co. 18 Q. B. D. 243, followed. *Furlong v. Reid*, 201.

2. *Notice of motion for judgment—Dispensing with service of—Con. Rule 467—“Sufficient cause.”*—Upon a motion to the Court for judgment on the statement of claim in default of defence, the plaintiffs asked for an order dispensing with service of notice of the motion upon the defendant under Con. Rule 467. It was not shewn that the defendant could not be served.

The order was refused.

Held, that the fact that the defendant had been personally served with the writ of summons and statement of claim and had not appeared was not "sufficient cause" within the meaning of the Rule. *Dominion Bank v. Doddridge*, 655.

3. *By-law—Procedure on motion to quash—Notice of motion—Time.*—The proceeding by rule *nisi* to quash a by-law is no longer in force, and the proceeding by motion is substituted for it; but see 322 of the Municipal Act, R. S. O. ch. 184, which requires four days' notice of an application to quash, is still in force; and the notice of motion given in this case, being only a two days' notice, was held insufficient. *Re Peck and Township of Ameliasburgh*, 664.

See AFFIDAVIT—INTERPLEADER, 1—JUDGMENT DEBTOR, 3.

NOTICE OF TRIAL.

1. *Counter-claim—Close of pleadings—Notice of Trial—Rule 180.*—The defendants by counter-claim delivered a reply, which contained more than a mere joinder of issue, to the statement of defence and counter-claim of the original defendants. No subsequent pleading having been delivered, the defendants by counter-claim, after the lapse of four days, served notice of trial.

Held, that the pleadings were not closed, and the notice of trial was therefore irregular. The plaintiffs, by counter-claim, were entitled under Rule 180 to twenty-eight days from the delivery of the defence and counter-claim in which to amend. *Garner v. Tune et al.*, 280.

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2. *Notice of trial—Service of before defence filed—Irregularity.*—Where an overdue statement of defence was filed on the last day for giving notice of trial for the Assizes, and a joinder of issue and jury notice were filed by the plaintiff on the same day, but after the filing of the defence,

Held, that the service of notice of trial with the joinder and jury notice, on the same day, before the filing of the defence, was not an irregularity. *Broderick v. Broatch*, 561.

See REMANET, COUNTER-CLAIM, 4.

OFFICIAL GUARDIAN.

See LUNATIC, 1, 2.

PARENT AND CHILD.

See INFANT, 1, 2, 4, 5.

PARTICULARS.

See COUNTER-CLAIM, 1.

PARTIES.

1. *Company—Shareholders—Use of corporate name in litigation.*—A corporation has the same right as an individual to withdraw its name from litigation to which it has been made a party plaintiff but of which it does not approve. The company itself is the proper plaintiff in actions for injury to the corporate property, and such an action by shareholders alone, shewing no reason why the company has not instituted the proceedings, cannot be sustained.

But where the complaint was that a majority of the shareholders had

obtained possession of the company's name and the control of its affairs, and were using it improperly for their own benefit, and causing injury to the company's property ;

Held, that an action could be sustained in the name of one or more shareholders, on behalf of themselves and all others, except the defendants, against the company and the majority of the shareholders. *International Wrecking Co. v. Murphy et al*, 423.

2. *Parties—Attacking fraudulent conveyance—Assignee for creditors under 48 Vic. ch. 26 (O.)—Execution creditors.*—In an action to set aside a conveyance by K. to his wife as fraudulent, brought by the assignee for the benefit of creditors of K., in pursuance of the powers conferred upon such assignee by 48 Vic. ch. 26, sec. 7, (O.), an order was made adding certain execution creditors of K. as parties plaintiff, upon the motion of the plaintiff, who desired that the action should not be defeated, if in other litigation pending it should be determined that the Act was *ultra vires*. *Ferguson v. Kenny*, 455.

3. *Parties—Action to set aside conveyance as fraudulent—Grantor a necessary party.*—Since the Judicature Act, in an action by a simple contract creditor, claiming merely to set aside a conveyance as fraudulent against creditors, the debtor and grantor is a necessary party as well as the grantee. *Gibbons v. Darvill et al*, 478.

4. *Parties—Mortgage action—Postponement of incumbrance prior to mortgage—Question of priority, how determined.*—C. recovered a judgment against L. in 1882, and

placed a *fi. fa.* lands in the sheriff's hands, which had ever since been regularly renewed; in 1883 L. bought land from the plaintiff, giving back a mortgage for the purchase money. Under a judgment for foreclosure recovered upon that mortgage, C. was added as a subsequent incumbrancer in the Master's office, and appealed.

Held, that C. was not properly added as a party in the Master's office; that the plaintiff was only entitled to have the claim to postpone the execution to the mortgage tried at the hearing.

But the plaintiff was allowed, following *Glass v. Freckleton*, 10 Gr. 470, to set aside his judgment, add C. as a party, and amend so as to raise the question of priority. *Lally v. Longhurst et al.*, 510.

5. *Parties—Appeal—Relief over.*—The plaintiff served notice of appeal from the judgment of the Common Pleas Division, 15 O. R. 544, upon both defendants, and furnished both with security for costs of appeal, but disclaimed any relief against the defendant B., and brought him before the Court only that the defendant L. might obtain any relief over against B. that he might consider himself entitled to. No notice of setting down or reasons of appeal were served on B. L. claimed no relief against B. in his pleadings or reasons of appeal.

Held, that B. was not a person a who would or might be affected by a reversal of the decision complained of, and there was no reason for retaining him before the Court. *O'Sullivan v. Lake et al.*, 550,

6. *Mechanics' liens—One lien against two owners—Joinder of parties—Summary application in action.*]

—Four mechanics worked with a contractor for wages upon two buildings, owned by different persons, and each registered a lien for his services on both the buildings, against the contractor and against both the properties on which they worked and against both the owners, each lien being for the amount of the whole wages due in respect of services as to both properties. All four joined in one action against the contractor and the two owners to enforce their liens.

Upon a summary application by the contractor, the mechanics' liens and writ of summons were set aside. *Oldfield v. Barbour et al.*, 554.

See COSTS, 3—EXAMINATION, 4—INTERPLEADER, 5—MECHANICS' LIEN, COUNTER-CLAIM, 5—JURY, 7—ADMINISTRATION—FORECLOSURE.

PARTITION.

1. *Partition or sale—Dowress as applicant—R. S. O. chs. 55, 101.*—Although some expressions in the Partition Act, R. S. O. ch. 101, authorize a person entitled to dower not assigned to apply for partition or sale of the lands in which she is interested, yet the Court may, in its discretion, refuse the application and leave the dowress to proceed under the Dower Procedure Act, R. S. O. ch. 55, or otherwise, to have her dower assigned. The provisions of the two Acts must be harmonized.

The application of a dowress for partition or sale of two parcels of land owned by the defendants in severalty, subject to the right of dower, was refused where the defendants opposed the application and the proposed proceedings were for the benefit of the applicant only.

Devereux v. Kearns, 11 P. R. 452, dismissed. *Fram v. Fram*, 185.

2. *Partition—Reference—Free to experts—G. O. Chy. 240.*—In the course of a reference to make a partition of lands, a Master appointed two skilled persons to examine the property and prepare a scheme of partition, and on their evidence he adopted the scheme prepared.

Held, that the course adopted by the Master was a reasonable one; that he had the power under G. O. Chy. 240 to take such course, and that the fees paid to the skilled persons by the defendant should be taxed to him. *McKay v. Keefer*, 256.

PARTNERSHIP.

Prohibition—Division Court—Judgment summons—Partnership—R. S. O. ch. 51, sec. 108, sub-sec. 4, 5, 6.—After judgment obtained against the firm of P. & Co., in a Division Court, upon service of summons on M. P., who was in fact the only member of the firm, an after judgment summons was issued and served on R. P. The Division Court Judge determined that R. P. had made himself liable as a partner by holding himself out as such, and was bound by the judgment, and liable to be examined as a judgment debtor.

Held, on motion for prohibition, that sub-secs. 4, 5, and 6 of sec. 108 of the Division Courts Act, R. S. O. ch. 51, are applicable only to persons who are in truth partners; and prohibition was ordered.

Munster v. Railton, 10 Q. B. D. 475; 11 Q. B. D. 435; 10 App Cas. 680, referred to. *Re Young v. Parker & Co.*, 646.

See JUDGMENT, 13—EXAMINATION, 9.

PAYMENTS INTO COURT.

Payment into Court—Withdrawal of part of claim—Dismissing action—Costs—Rules 170, 218.]—The plaintiffs claimed in this action \$3,249,36, "amount of defalcation of J." and 90,55 for certain expenses connected therewith, in all \$3,339.91. The defendants paid into Court \$3,273, claiming by their notice of payment in, that it was sufficient to satisfy the plaintiffs' claim. There was no specific application of the money paid in to any part of the claim. The plaintiffs did not deliver a statement of claim, and, upon notice of a motion under rule 203 to dismiss the action being served by the defendants, the plaintiffs gave a notice under Rule 170 of withdrawal of the balance of their claim.

Held, that the plaintiffs had no power under Rule 170 to withdraw : the portion of Rule 170 relating to the withdrawal of part of the alleged cause of the complaint is applicable only where the part sought to be withdrawn can be severed from the rest of the claim ; and an order dismissing the action was proper.

Semble, that the plaintiffs, not having under Rule 218 accepted the money in full satisfaction of their claim, were liable to pay the whole costs of the action ; but the disposition of costs by the local Judge who made the order was not interfered with on appeal. *The Bank of London v. The Guarantee Company of North America*, 499.

PERSONA DESIGNATA.

See ARBITRATION, 2.

PLEADING.

1. *Pleading*—"Not guilty by statute"—*Action for specific performance of contract.*]—"Not guilty by statute" cannot be pleaded to an action for specific performance of a contract ; and the defence of "not guilty" irrespective of statutory authority is not admissible under the Judicature Act. *Town of Peterborough v. Midland R. W. Co. and Grand Trunk R. W. Co.*, 127.

2. *Pleadings—Summary application to set aside—Demurrer—Res judicata—Counter-claim against third party.*]—As a general rule pleadings cannot be set aside on summary applications unless so plainly frivolous or indispensable as to invite excision. Where a matter is doubtful or difficult it is better to leave the objecting party to demur ; and even if the pleading appears to be demurrable, that is not a sufficient reason for expunging it from the record.

And where, in an action by the assignee of C. for the benefit of his creditors under 48 Vic. ch. 26 (O.) stated to be brought for the benefit of one of such creditors, the F. Bank, to set aside a mortgage made to the defendants, as fraudulent and preferential, a judgment for foreclosure of the mortgage obtained against the plaintiff was pleaded as a bar to the action, and a counter-claim was asserted for payment by the F. Bank of certain moneys alleged to be due to the defendants, a motion to strike out such defence and counter-claim was refused, and the plaintiff was left to demur.

Semble, that the counter claim was not admissible. *Glass v. Grant et al.*, 480.

3. *Pleading—Action for malicious prosecution—Observations of Judge at trial of criminal charge.—Publication of charge.*—In an action for malicious prosecution, a part of the statement of claim setting out the observations of the Judge before whom the plaintiff was tried upon the criminal charge out of which the action arose, was struck out; but a part stating damage to the plaintiff from publication of such charge in newspapers and otherwise by defendants, was allowed to stand. *Morrow v. Cheyne et al.*, 487.

See JUDGMENT, 11, 12—COUNTER-CLAIM, 4, 5—INDEMNITY—STATEMENT OF CLAIM.

PRODUCTION.

1. *Discovery—Affidavit of documents—Evidence on motion for better affidavit—Inspection of documents—Rule 234, O. J. A.*—The plaintiff sought to compel the defendant F. McD. to file a better affidavit of documents, and relied upon the affidavit of documents of a co-defendant D. M. McD., and also upon an affidavit of F. McD., filed upon an interlocutory motion in the action, as shewing that she had in her possession a power of attorney and statements of account which were not set out or in any way alluded to in her affidavit of documents, wherein she stated that the documents set out were the only ones in her possession relating to the action. In the affidavit on the interlocutory motion F. McD. admitted that she had received the power of attorney and statements of account in question from D. M. McD., but not that she had them at the time of making her affidavit of documents.

Held, reversing the order of Wilson, C. J., in Chambers, that the affidavit of D. M. McD. could not be received to contradict the affidavit of documents of F. McD., and that her admissions relied upon were not sufficiently explicit, for it was not to be inferred in the face of her affidavit of documents that at the time of making it she still had the documents which were at one time received by her; and,

Per ROSE, J., upon a subsequent motion, the Court having refused to order a better affidavit of documents an application under Rule 234, made upon the same material, for inspection of the documents in question on the former application, could not succeed. *MacGregor v. McDonald*, 81.

2. *Discovery—Production of documents—Railway accident—Report and evidence on investigation.*—The plaintiff in an action for damages for injuries sustained in a railway accident, sought to compel the defendants to produce a certain report of an investigation held by the defendants immediately after the accident, and the notes of evidence taken at the investigation. These documents, according to the evidence of H., an officer of the defendants, who was examined for discovery in the action, were not obtained for the solicitor of the defendants, nor for the purpose of being laid before him for advice, nor in view of any impending or threatened litigation, nor after litigation commenced; but "for the purpose of the management of the line; for our own purposes; it was not intended for a purpose of this kind" (*i. e.*, for use in legal proceedings). In answer to the question whether the defendants' solicitor was present at the investigation, H. said, "No;

it would be entirely between the officers of the company." The affidavit of the solicitor stated that the information was obtained that he might advise the defendants as to their liability for damages arising from the accident, and that it had been used for that purpose and no other. The defendants' affidavit of documents did not claim privilege for these documents, but denied the possession of any documents relating to the matters in question; but it was admitted that the affidavit of documents had been prepared under misapprehension of the facts, and that these documents were in the possession of the defendants.

Held, that the Court need not under these circumstances consider whether the examination of H. could be received to contradict the affidavit of documents, but should look at the matter as if the documents had been set out and privilege claimed for them; and that upon the statements of H. and the solicitor, the documents were not privileged and should be produced.

Wheeler v. Le Marchant, 17 Ch. D. 675, and *Westinghouse v. Midland R. W. Co.*, 48 L. T. Rep. N. S. 462, followed. *Betts v. Grand Trunk Railway Company*, 86, 634.

See EXAMINATION, 1, 3, 4, 5, 9, 10—INTERPLEADER, 1—WINDING UP PROCEEDINGS, 2.

PROHIBITION.

1. *Prohibition—Division Court—Corporation—Question of fact.*—Motion for prohibition to a Division Court on the ground that the Western Fair Association did not exist in fact or in law, and could have no title to the Grand Stand in dispute,

and therefore the Court had no jurisdiction to enforce the judgment in the suit.

Held, that the question of corporation or no corporation was one of fact, and that the decision thereon was not reviewable in prohibition. *Re The Western Fair Association v. Hutchinson*, 40.

2. *Prohibition—Division Court—Attachments of debts—R. S. O. ch. 47, sec. 125—"Employee"—Medical health officer.*—The defendant was the medical health officer of the city of London, and his monthly salary as such was attached in the hands of the city corporation, in a Division Court action. It was claimed by the defendant that \$25 of the amount due him was exempt from attachment under R. S. O. ch. 47, sec. 125. No facts were in dispute, and the Division Court Judge determined, as a matter of law, upon the construction of the above section, and of the Public Health Act, 1884, and amending Acts, the Municipal Act, 1883, sec. 281, and a by-law of the city of London, that the defendant's salary was not so exempt.

Held, by ROSE, J., in Chambers, that the decision of the Judge could be reviewed upon a motion for prohibition, and that he had determined wrongly.

Held, by a Divisional Court, WILSON, C. J., dissenting, that the defendant was not an employee within the meaning of R. S. O. ch. 47, sec. 125, and that it was therefore rightly determined that his salary was not exempt. *Re Macfie v. Hutchinson—City of London, Garnishees*, 167.

3. *Prohibition—Division Court—Matter of Practice.*—A motion for prohibition to a Division Court on the ground that the action was re-

vived by the administrator of the plaintiff without serving a summons or notice on the defendant, as required by the Division Court rules, was refused, the irregularity complained of being a mere matter of practice, and therefore not reviewable in prohibition. *Re McKay v. Palmer*, 219.

4. *Prohibition—Division Court—Notice disputing jurisdiction—Ascertainment of amount.*—*Held*, doubting but following *Re Knight v. Medora*, 14 A. R. 112, and *Re Mead v. Creary*, 31 C. P. 1, that the operation of sec. 14 of the division Courts Act, 1880, is restricted to cases within the general jurisdiction of the Division Courts, and the absence of a notice under that section disputing the jurisdiction cannot give jurisdiction where the amount claimed is beyond the competence of a Division Court.

But where a cheque was given to the defendant by the plaintiff as a loan of the money represented by it:

Held, that the endorsement of the signature of the defendant on the cheque which was payable to his order, was a sufficient ascertainment of the amount of the plaintiff's claim by the signature of the defendant to satisfy sec. 54 of R. S. O. (1877) ch. 47, as amended by sec. 2 of 43 Vic. ch. 8 (O.), and to give a division Court jurisdiction where the amount claimed without ascertainment would have been beyond its competence.

Kinsey v. Roche, 8 P. R. 515, overruled; and *Wiltsie v. Ward*, 8 A. R. 549, *Forfar v. Climie*, 10 P. R. 90, specially referred to.

Cushman v. Reid, 20 C. P. 147, distinguished. *Re Graham v. Tomlinson*, 367.

5. *Prohibition—Division Court—Judgment against garnishee—Proof of amount due*—49 Vic. ch. 15, sec. 12—*Money paid into Court.*—*Held*, reversing the decision of STREET, J., in Chambers, that the Judge of a Division Court has no jurisdiction to give judgment against a garnishee without proof of the amount owing by the garnishee to the judgment debtor, and for such a cause prohibition will lie.

There is nothing in the sub-section substituted by 49 Vic. ch. 15, sec. 12, for R. S. O. (1877) ch. 47, sec. 136, sub-sec. 2, which repeals the condition precedent in section 132 to the Judge's giving judgment against the garnishers.

Held, also, that, if necessary, the writ of prohibition should go to compel the re-payment to the garnishee of money paid by him into the Division Court. *Re Johnson v. Therrien Cadieux*, garnishee, 442.

6. *Prohibition—Division Court—Married woman—Examination and committal as judgment debtor—Indorsement on judgment summons.*—A judgment against a married woman by virtue of the Married Women's Property Act creates no general personal liability, but merely charges her separate estate; and the provisions of sec. 117 of the Division Courts Acts, R. S. O. (1877) ch. 47, as amended by 43 Vic. ch. 8, touching the examination of judgment debtors, are not applicable to a married woman against whom judgment has been obtained in the Division Court, and, even if liable to be examined, such a person is not liable to be committed to goal under sec. 182.

Metropolitan L. & S. Co. v. Mara, 8 P. R. 355, distinguished.

A creditor's rights against a mar-

ried woman debtor are determined by the statute at the time the debt is contracted; and cannot be enlarged by the debtor subsequently becoming a widow.

Held, also, following *Regina v. The Judge of the Brompton County Court*, 18 Q. B. D. 213, that the Judge's endorsement on the judgment summons was the order upon such summons; and that a subsequent order was illegal *Re McLeod v. Emigh*, 450.

7. *Prohibition—Division Court—Co-defendant out of jurisdiction—Taking chances at trial—Delay in moving.*—T., one of the defendadts in a Division Court action, resided out of Ontario, and process was served substitutionally upon him. L., the other defendant, objected that the Court had no jurisdiction by reason of T's absence from the Province. No written notice of this objection was given before the trial, there was a conflict of evidence as to whether it was taken at the trial, and the suit was defended on a different ground. The trial was on the 13th January, 1888, when judgment went for the plaintiff for more than \$100; a new trial was moved for by L., and was refused on the 23rd February, 1888; execution then issued, under which goods of L. were seized, and became the subject of an interpleader. L. did not appeal, but on the 16th of May, 1888, moved for prohibition.

Held, that L. having taken his chances at the trial and not having appealed, nor sufficiently accounted for his delay in moving, the discretion of the Court should not be exercised in his favour. *Re Soules v. Little et al.*, 533.

See COSTS, 22—PARTNERSHIP.

POSSESSING TITLE,

See VENDOR AND PURCHASER, 1.

QUASHING BY-LAW.

See NOTICE OF MOTION.

QUIETING TITLES.

Quieting titles—Advertisement—Irregularity—Waiver.—Where the advertisement in a Quieting Titles proceeding was posted at another Court House than that required by G. O. Chy. 904 ;

Held, that the irregularity might be waived under R. S. O. (1887) ch. 113, secs. 45, 46. *Re Harris*, 430.

RAILWAY.

1. *Railway company—Notice of expropriation—Desistment.*—A railway company at different times served H. with three several notices under the Dominion Railway Act, stating that portions of land owned by him were required by the company's line. To each of the first two notices H. replied by a notice appointing an arbitrator, but stating such appointment to be expressly without prejudice to his right to insist that the company had no right to take any part of his land. The company served successive notices of desistment from all their three notices, and H. gave notice that he objected to the third notice of desistment, and claimed that the company had no right to desist from their third notice of expropriation.

Held, that the company had not exhausted their powers of desistment, but had the right to desist from their

third notice. H. could not be allowed to complain of the abandonment by the company of proceedings to compel him to sell his land to them when he had notified them at every opportunity that he intended to contest their to compel him to do so; after they had acted upon his expressed intention and abandoned the notice to which he objected, it was too late for him to endeavour to insist upon its validity.

Grierson v. Cheshire Lines' Committee, L. R. 19 Eq. 83, referred to. *Re Hooper and the Erie and Huron R. W. Co.*, 408.

2. *Railway Company—Expropriation of land—Notice—Time—51 Vic. ch. 29, sec. 164, (D).*]—In the computation of the ten days previous notice necessary to be given under 51 Vic. ch. 29, sec. 164, (D.) to obtain a warrant for the possession of land by a railway company, the day of the service of the notice and the day of the return must both be excluded. *Re Ontario Tanners' Supplies Company and Ontario and Quebec R. W. Co.*, 563

RECEIVER.

Receiver by way of equitable execution—Motion for in Court or Chambers—Costs—O. J. Act, sec. 17, sub-sec. 8, Rule 399—Amount of judgment—Other remedies.]—A motion for the appointment of a receiver by way of equitable execution is properly made in Court, notwithstanding the language of the O. J. Act, sec. 17, sub-sec. 8, and Rule 399, and the applicant will not be restricted to the costs of a Chambers motion.

A judgment for \$212.60 is not too small to justify the judgment creditor in moving for a receiver.

It is no answer to such a motion that the judgment creditor could probably make the amount of his judgment out of the defendants by the sale under common law process of other property of the defendant than that sought to be reached by the appointment of a receiver. *Kincaid v. Kincaid*, 462.

REFEREE.

1. *Referee—Report—Effect of—Reasonable and probable cause—Evidence.*]—The report of a referee is equivalent to the verdict of a jury. It should state the referee's conclusions; and he need not give the reasons for his findings.

The referee, who was a barrister, found that there was a want of reasonable and probable cause for the defendant proceeding criminally against the plaintiff. It was objected that it was a finding of law and not not of fact.

Held, that this was equivalent to a verdict for the plaintiff rendered by a jury under instruction by a judge or what would be evidence of want of reasonable and probable cause; and on the evidence the findings could not be interfered with. *Fawcett v. Winters*, 232.

2. *Reference—Sec. 47, O. J. A.—Actions on fire insurance policies—Accounts—Other issues.*]—Where in actions upon fire insurance policies the questions in issue between the parties were not confined to matters of mere account, but the defendants disputed their liability, and issues of fraud, misrepresentation, and concealment of facts were raised upon the pleadings.

Held, that an order referring all the issues in the actions to a referee

for enquiry and report was improperly made, and that the plaintiff was entitled to have a trial in the ordinary way. *Clarry v. British America Assurance Co.*, 357.

3. *Reference—C. L. P. Act, sec. 197—Powers of Local Master—Absconding Debtors Act, secs. 8, 9.*—Local Masters have no greater powers in matters coming before them in Chambers under the jurisdiction given them by the Ontario Judicature Act and 48 Vic. ch. 13, sec. 21 (O.), than those conferred upon the Master in chambers, and from these powers the power of referring causes under the Common Law Procedure Act is excepted. A Local Master has, therefore, no power to make an order to proceed against an absconding debtor, upon default, after service of the writ of attachment, where such order contains a clause directing a reference under sec. 197 of the Common Law Procedure Act. It is intended by secs. 8 and 9 of the Absconding Debtors Act that only one order shall be made under which the plaintiff may proceed to judgment, and, therefore, an order of reference is necessary the order to proceed must be made by a Judge who has jurisdiction to refer causes.

The expression "the referring of causes under the Common Law Procedure Act" is not restricted to causes which have been begun by writ of summons. *Bank of Hamilton v. Baine*, 418.

REMANET.

Notice of trial—Remanet.—Where a case has been made a *remanet* at the Assizes, a notice of trial for the Chancery Division Sittings is irregular. *Ward et al. v. Jackson*,

See NOTICE OF TRIAL.

RENEWAL OF WRIT.

See WRIT OF ASSISTANCE.

RENT.

See LANDLORD AND TENANT.

REPLEVIN.

Writ of replevin—Direction of to sheriff who was also liquidator of plaintiffs—Irregularity—Waiver—R. S. O. (1877) ch. 53, sec. 9.—In a replevin action the writ was directed to a sheriff who was the sole liquidator of the plaintiffs, and as such instituted the action.

Held, that this was at most an irregularity, and it was too late for the defendant to raise the objection after appearance.

R. S. O. (1877) ch. 53, sec. 9, applies to the case of an application on the merits, and not for irregularity only.

Quære, whether, if the objection had been taken in time, it should have prevailed, having regard to the kind of duty the sheriff has to perform in executing a writ of replevin and to the position of the liquidator as a mere officer under the Act. *Alpha Oil Co. v. Donnelly*, 515.

REPLY.

See COUNTER-CLAIM.

REPORT.

Report—Confirmation—Order—Consent.—Unless by consent, a report cannot be confirmed until

after the lapse of the time limited by Con. Rule 848.

It is an undesirable practice for an officer to make an order confirming his own report. *Patterson v. Gilbert*, 652.

See REFEREE, 1.

RES JUDICATA.

See WINDING-UP PROCEEDINGS.

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SOLICITOR.

See COSTS, 31.

SOLICITOR AND CLIENT.

1. *Solicitor and client*—*Delivery of bill of costs*—*Offer by solicitor*—*Taxation*.]—Where a solicitor has offered to take in full settlement less than the amount of a bill of costs as rendered, and has made the offer in a manner unequivocal and binding upon him, then and not otherwise he is to be allowed the benefit of the offer upon taxation if the client reject it and proceed to tax the bill. *Re Freeman et al.*, 1 Ch. Chamb. R. 102, and *Re Carthew* and *Re Paull*, 27 Ch. D. 485, considered and explained.

And where the offer to make a reduction in the bill was not upon the face of it, nor in any letter accompanying it, but was made verbally and in the course of a conversation on the subject after the delivery of the bill,

Held, that the offer was not of an unequivocal character made so as to be binding upon the solicitor, but left him free when it was not accepted to claim all he could get upon a taxation, and he was therefore not entitled to the benefit of it. *Re Allison et al., Solicitors*, 6.

2. *Action begun without authority — Dismissal — Costs — Procedure after judgment — Creditors.*]—An action was brought on behalf of the plaintiffs and all other creditors of V. to obtain from the defendant, the assignee of V. for the benefit of creditors, an account of all moneys received by him from the estate of V., and for payment of what might be found due. Judgment was pronounced in favour of the plaintiffs, directing a reference to take the accounts and reserving further directions and costs. The judgment was not issued, and after it was pronounced the defendant and the plaintiffs' solicitor both died. The executrix of the defendant obtained from a local Judge a summons to compel the plaintiffs to revive the action, or to dismiss it with costs. On the return of the summons, counsel for the plaintiffs stated that they would consent to an order dismissing the action without costs, but if that were not agreed to, that they desired an enlargement to shew that the plaintiffs had never authorized the bringing of the action and that they had no knowledge of it until the service upon them of the summons now in question. The local Judge, however, made an order dismissing the action with costs.

Held, on appeal, that the local Judge would have been justified in dismissing the action without cost if it had been shewn to him that it was brought without the authority

of the plaintiffs, and that he should granted an enlargement for that purpose, and if he had after the enlargement been satisfied of the truth of the plaintiffs' statements, he should have discharged the summons; for a party should not be required against his will to continue in his name an action which he never authorized to be begun.

The old Chancery rule that an action can be dismissed, on the application of a plaintiff who has not authorized his name to be used, only on payment of costs, is not now in force, but the plaintiff is now entitled to an order to stay the proceedings without payment of costs.

Reynolds v. Howell, L. R., 8 Q. B. 398, and *Nurse v. Durnford*, 13 Ch. D. 764, followed.

Held, also, that an action of this kind should not have been dismissed after judgment pronounced, for the creditors other than the plaintiffs should not have been deprived of the benefit of the judgment. *McKay et al. v. MacFarlane*, 149.

3. *Solicitor and client—Order for taxation—Taxing officer, powers of—Order for payment over.*]—Under the common order for taxation of a solicitor's bill of costs, Form 136, O. J. A., a taxing officer has power to investigate and dispose of questions of carelessness, impropriety, and negligence in the conduct of the business to which the bill relates; and the officer's certificate is conclusive as to all matters within his jurisdiction.

Where, therefore, after action brought upon a bill of costs there has been a taxation under such an order, there is an end to litigation, and it only remains to enforce payment of what has been found due, which may be done upon a subsequent application by the solicitor.

The original order for taxation may reserve questions of retainer and negligence in a proper case, but if it does not the client should not be allowed a double chance of defeating the solicitor's claim, by proceeding to defend the action after the conclusion of the taxation.

Re Clark, 9 P. R. 337, and *McDonald v. Piper*, 10 P. R. 586, distinguished. *Re Millar, a Solicitor*, 155.

4. *Action—Settlement—Powers of solicitor.*—The order of the Master in Chambers (9 P. R. 220) staying proceedings on the ground that the action had been settled by the plaintiff's solicitor, was reversed because the evidence shewed that the settlement was a provisional one, and that the plaintiff himself had not adopted it. *McDonald v. Field*, 213.

5. *Solicitor—Delivery of bill to third party—Right to taxation—Præcipe order.*—Upon the application of a mortgagor the mortgagees' solicitor was ordered, by a County Judge, to deliver to the applicant a copy of the bill of costs of a sale under the power in the mortgage; and the bill was delivered pursuant to the order.

Held, that although the delivery was, under sec. 45 of the Attorneys' Act, to be regarded as for the purposes of a reference to taxation, yet the person so obtaining the copy of the bill had not necessarily the right to tax the bill; and a *præcipe* order for taxation was set aside, where at the time of making it there were two matters in dispute, viz., whether payment as such had been made by the mortgagees to the solicitor, and whether the mortgagees had precluded themselves from the right to tax the bill. *Re Moffatt, a Solicitor*, 240.

6. *Settlement of action—Powers of solicitor—Instructions from client.*]

—After the trial of an action had been postponed at the assizes and the defendant had left the assize town, his solicitor and counsel effected a settlement with the plaintiff, which was given effect to by the entry of a verdict and judgment by consent. The solicitor admitted that he was not instructed, but relied on his client adopting the settlement, which was in the solicitor's opinion a favourable one. The client said that he had instructed the solicitor not to settle in the way he did.

Held, that the defendant was entitled to have the verdict and judgment set aside and a new trial, on payment of costs. *Watt v. Clark*, 359.

7. *Solicitor and client—Reference to taxation at solicitor's instance—Order for payment—Costs of reference.*]

—A solicitor who has obtained an order for taxation of his bill of costs against his client, and taxed his bill under it, is not entitled to a summary order for payment of the amount found due. Where the client obtains the order for taxation, he thereby submits himself to the summary jurisdiction of the Court, and should be ordered to pay the amount found to be due to the solicitor.

Semble, also, that the order for taxation under Rule 443 should, under the authority of sub-sec. (d.) of that rule, where it is made upon the client's application, contain an order for the payment by him of the amount to be found due upon the reference, but when it is made upon the solicitor's application, should contain no such order. The solicitor should be entitled to add the costs of the reference to his claim only in the event of the client appearing upon the reference.

Miller v. Cline, 12 P. R. 155, distinguished.

In re Harcourt, 32 Sol. J. 92, followed. *See Washington, a Solicitor*, 386.

8. *Solicitor and Client*—*Authority of solicitor to settle*—*Variation of interpleader order*,]—A solicitor retained to collect a debt is not entitled to interplead without a further retainer for that purpose, but being so retained he has the ordinary rights of solicitors as in other contested cases.

And where solicitors properly representing the claimant and the execution creditors in an interpleader made an arrangement by which \$441 of the claim made and provided for in the interpleader order was abandoned, and the sheriff, by the direction and consent of both the solicitors, in good faith distributed \$441 among the creditors entitled, and paid only the balance into Court, instead of the whole proceeds of the sale, as directed by the interpleader order, which was not amended :

Held, that the solicitors had authority to make such a variation of the order, and the sheriff was justified in acting upon it ; and it made no difference that the interpleader order was a consent order, for it was an interlocutory order, and the variation did not affect third parties. *Hackett v. Bible*, 482.

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- R. S. O.*, ch. 66, sec. 1121.
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- R. S. O.*, (1877) ch. 66, sec. 2518.
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TAXING OFFICER.

Taxing officer, powers of—Evidence—Solicitor—Retainer.]—The taxing officers have the power to call for evidence on taxations pending before them.

Where the plaintiff was out of the jurisdiction, and a taxing officer had refused to proceed with the taxation of her costs of the action against the defendants until she was produced before him for examination, touching her retainer of the solicitor in whose name the proceedings in the action had been conducted, it was directed that the officer should first examine other witnesses, and then if unable to decide the question of retainer, should report to a Judge in Chambers. *Williamson v. Town of Aylmer*, 129.

See COSTS, 11, 19, 26—SOLICITOR AND CLIENT, 3.

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See APPEAL, 6, 8, 9, 13, 14—ARBITRATION, 3—RAILWAY, 2.

TRIAL.

Order made at trial, how signed—Divisions of High Court.]—Where an action in the Queen's Bench or Common Pleas Division of the High Court of Justice is, under Rule 590, set down for trial at a sittings for trial of actions in the Chancery Division, any order made in such action by the Judge presiding at such sittings should be signed by the officer who acts as registrar at such sittings, and not by the registrar of the Division to which the action belongs. *Waghorn v. Hawkins*, 14.

See EXAMINATION, 145.

STATEMENT OF CLAIM.

Statement of claim, delivery of—Irregularity—Waiver.]—Upon the defendant's application to dismiss the action for want of prosecution, an order was made on the 6th May, that upon payment by the plaintiff of \$20 costs within 18 days, and upon his delivering his statement of claim within the same time, the defendant's application was dismissed. On the 26th May, after the expiry of the 18 days, the plaintiff filed his statement of claim, delivered a copy to the defendant's solicitors, and tendered them \$20, which they refused to accept. They also declined to admit service of the statement of claim, but retained it in their possession. On the 3rd June an order was made extending for one week the time for filing and delivering the

statement of claim and paying the \$20. This order did not provide that the statement of claim already delivered should stand. Within the week the plaintiff paid the \$20, and nine days afterward signed judgment against the defendant for default of defence, upon the statement of claim delivered on the 26th May.

Held, affirming the decision of the Master in Chambers, that although the plaintiff was wrong in filing and serving his statement of claim before paying the costs, this irregularity was waived and the service became effective when the costs were afterwards received, they being paid under the order of the 3rd June. *Pierce v. Palmer*, 275.

See PLEADING, 3.

TERM OF COURT.

See ARBITRATION AND AWARD, 4.

VACATION.

See APPEAL, 1.

VAGRANT.

See CONVICTION, 4.

VARIANCE.

See CONVICTION, 3, 5.

VENDOR AND PURCHASER.

1. *Vendor and purchaser—Verification of abstract—Mortgage, presumption or proof of payment of—*

Evidence of registration—Evidence of possession—Election to make perfect title.].—1. Upon a sale of land

the abstract of title set out a mortgage given to a building society in 1850, the mortgagor being a shareholder by subscription. The proviso was for repayment at the times appointed in the company's rules, by monthly subscriptions, to be continued until the objects of the society should be attained. The mortgage was produced, and had indorsed upon it a memorandum, without date, purporting to be signed by the secretary-treasurer of the society, that it was paid and settled in full, but the signature was not proved. In conveyances made in 1856 and 1874 this mortgage was treated as a subsisting incumbrance.

Held, that this mortgage should not, in favor of the vendor, be presumed to have been satisfied; nor, having regard to the provisions of Chy. G. O. 394 and 396, should the question be disposed of upon a presumption of law. The vendor should shew that some portion of the purchase money did not become payable under the rules of the society within the period of ten years before the contract, or that this could not be ascertained; or that the records of the society could not be referred to; or that there was difficulty in proving the fact set forth in the indorsement on the mortgage, that it had been paid in full.

2. The abstract also set out a registered conveyance from L. G. *et al.* to S. G.

Held, that the purchaser was entitled to the vendor's expense to the production of the conveyance with the usual registrar's certificate of registration of duplicate indorsed upon it, or to the production of a registrar's certified copy.

Re Charles, 4 Ch. Chamb. R. 19, commented upon.

3. If the vendor relies upon a possessory title the purchaser is entitled to cross-examine persons making affidavits in support of it, for the reasons given in *Re Boustead and Warwick*, 12 O. R. at p. 491.

4. It appeared that the vendor, although by the contract he had limited himself to certain proofs, had elected to make out a title perfect both as to abstract and verification, in order that he might compel the purchaser to accept it.

Held that the purchaser was entitled to have the title made out as strictly and completely as if the vendor had not in any way guarded himself by the terms of the contract. *McIntosh v. Rogers*, 389.

2. *Sale of land—Order of Court in infancy matter—Default of purchaser—Re-sale.*].—In a matter pending before the Court concerning the sale of infants' lands, an order was made directing the acceptance of an offer to purchase the lands, which had been made before the matter came into Court. The purchaser having made default, the Master in Chambers made an order for payment of the purchase money, and in default for a re-sale, and payment by the purchaser of any deficiency.

An appeal from this order on the grounds that the contract provided a penalty for default, viz., forfeiture of the deposit, and that the practice followed was not the proper one, as the sale was not under the standing conditions of the Court, was dismissed. *Re Hornibrook*, 591.

3. *Costs—Specific performance—Vendor and purchaser—Title, when shewn—Demand of abstract.*].—*Held*, in an action for specific performance,

that shewing title is the manifestation on the abstract of all matters essential to a good title, and that as the defendant had demanded no abstract before action, he could not complain that title was first shewn thereafter, and he was ordered to pay the costs thereof.

Bridges v. Longman, 24 Beav. 27, cited and followed. *London and Canadian Loan and Agency Co. v. Graham*, 651.

See EXAMINATION, 7.

VENUE.

1. *Venue—Preponderance of convenience—Expense.*]—*Held*, under the circumstances set out in the judgment, that the preponderance of convenience and extra expense were not sufficient to support an order changing the venue from the place proposed by the plaintiff.

Shroder v. Myers, 34 W. R. 261, followed. *Ross v. The Canadian Pacific Railway Company*, 220.

2. *Venue—Preponderance of convenience—Expense.*]—*Held*, under the circumstances set out below, that the defendant would be put to an undue and disproportionate inconvenience and expense if the action were tried at the place proposed by the plaintiff; that there was a very great preponderance of convenience in favour of the place at which the defendant sought to have the trial, and the venue was therefore changed.

Shroder v. Myers, 34 W. R. 261, distinguished. *Nicholson et al. v. Linton*, 223.

3. *Venue—Alimony action—Preponderance of convenience.*]—The venue was changed from Whitby to

Toronto in an action of alimony upon the application of the defendant, where there was not sufficient difference in expense to warrant the change in an ordinary case, because of the rule in alimony cases which imposes on the defendant the burden of advancing and paying all the disbursements on both sides in any event.

The circumstance that two of the defendant's witnesses, who resided in Toronto, were public officers, and that their absence would be a public inconvenience, was also considered in determining the preponderance of convenience. *Fogg v. Fogg*, 249.

4. *Venue—Preponderance of convenience—Disclosing the names and evidence of witnesses.*]—The plaintiff lived in Montreal and the defendant in Toronto; the plaintiff had twenty-six witnesses in Montreal, and the defendant twenty-eight in or near Toronto. On a motion to change the venue from Cornwall to Toronto, the Master in Chambers directed the parties to put in affidavits disclosing the names and the nature of the evidence of the witnesses, and upon these determined that the evidence of some of the Montreal witnesses would be irrelevant to the issues, while all the Toronto witnesses might be important, and changed the venue to Toronto. Upon appeal, *Held*, that the conclusion of the Master as to the evidence was correct, and his order for change of venue proper upon the affidavits before him; but,

Seem, the direction to disclose the names and evidence of witnesses was improper; not having been appealed against, however, and having been complied with, it could not be disturbed. *Arpin v. Guinane*, 364.

5. *Venue—Convenience—Cause of action—Leave to appeal—Terms.*—The question for decision on an application to change the place of trial is, where can the action most conveniently be tried;

And where, in an action on a promissory note for the contract price of work done by the plaintiff in refitting a mill in the county of Middlesex, to which the defence was that the contract had never been carried out, the plaintiff had eight witnesses in Toronto or east of Toronto, and the defendant eight in Middlesex or west of Middlesex, upon the defendant's application to change the place of trial from Toronto to London, it was,

Held, that London was the most convenient place for trial, and the venue was changed accordingly.

Per ARMOUR, C. J.—An action should be tried in the county where the cause of action arose.

Leave to appeal to the Court of Appeal was asked by the plaintiff because it was of importance to him in other litigation to have the question of venue decided, and was granted upon his undertaking to pay the costs of both parties of the appeal. *Greey v. Siddall*, 557.

VERDICT.

See JUDGMENT, 10.

WAIVER.

See APPEAL, 6, 7, 11—REPLEVIN, STATEMENT OF CLAIM, EXAMINATION, 15—INFANT, 4.

WARRANT OF COMMITMENT.

See INFORMATION, CONVICTION, 5.

WILL.

See COUNTER-CLAIM, 1.

WINDING-UP PROCEEDINGS.

See COMPANY.

WITNESS.

See VENUE, 4—FOREIGN COMMISSION.

WORDS.

Adult.—*See* LUNATIC, 1.

"*Appeal brought.*"—*See* APPEAL, 9.

"*As between solicitor and client.*"—*See* COSTS, 23.

Employee.—*See* PROHIBITION, 2.

Intent to defeat.—*See* ARREST, 1.

Intent to defraud.—*See* ARREST, 1.

Sufficient cause.—*See* NOTICE OF MOTION, 2.

WRIT OF ASSISTANCE.

Writ of assistance—R. S. O. ch. 66, sec. 11.—The application of R. S. O. ch. 66 is not limited to purely common law action pending in those Courts before the Judicature Act, but extends to all writs of execution;

and a writ of assistance in execution of a decree of the Court of Chancery for the recovery of land, is a writ of execution within the meaning of sec. 11 of that Act, and is not in force after one year from the teste, if unexecuted, unless renewed. *Adamson v. Adamson*, 21.

WRIT OF ATTACHMENT.

See ARREST, 3.

WRITS OF FI. FA.

See PARTIES, 4—WRIT OF ASSISTANCE — MECHANICS' LIEN — JUDGMENT, 8.

WRIT OF SUMMONS.

Writ of summons—Amending endorsement—Re-serving the Writ.]—The writ of summons was specially indorsed with a money demand, besides which the indorsement claimed damages for waste, &c.

The plaintiff obtained an *ex parte* order amending the indorsement by striking out the claim for damages.

Held, that judgment by default could not be entered after the amendment without re-serving the writ on the defendant. *Guess v. Perry*, 460.

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